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IN THE

SUPREME COURT OF THE UNITED STATES

75-6410 TERM, 1976

TED LEMUEL CARTER,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on December 17, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed on December 17, 1975 bearing Opinion No. 54 and reported in 289 NC 35, (1975). A copy of the opinion is hereto attached and made a part of this petition.

JURISDICTION

The opinion of the Supreme Court of North Carolinaabove referred to was entered and certified to the Superior Court of Gaston County, North Carolina on December 17, 1975 and an Order for Stay of Execution was entered on the 23rd day of December, 1975, and executed by The Honorable Susie Sharp, Chief Justice of the Supreme Court of North Carolina. The Stay of Execution

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was granted pending the determination of this Petition for Writ of Certiorari to the United States Supreme Court.

Jurisdiction of this Court is invoked under 28 USC 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

(a) N. C. General Statute 14-17 as amended effective April 8, 1974:

"Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

(b) N. C. General Statute 15-188:

"Manner and place of execution.-- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The supreintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

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STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on December 17, 1975, affirming the petitioner's conviction and death sentence for first degree murder. Petitioner, Ted Lemuel Carter, was convicted and sentenced to death at the January 6, 1974 session of the Superior Court of Gaston County for the murder of Benjamin F. Stroupe. At this trial the petitioner was also convicted of the armed robbery of Mr. Stroupe but this judgment was arrested since the armed robbery was the predicate felony of the felony murder count.

The State of North Carolina introduced evidence tending to show the following: On July 30, 1974 the defendant together with David "Monkey" Chandler and the defendant's girlfriend "Cherokee" visited the home of one Milous Holland where the defendant Carter borrowed Holland's .32-caliber pistol, purportedly for protection in a poker game. On August 2, 1974 the defendant and Chandler were at the Smyre Gang Clubhouse located near Spencer Mountain when Harold Davis arrived around 8:00 a.m. Davis loaned his 1973 Chevrolet Vega automobile, red with a white stripe down the side, license number BJZ-388, to the defendant and Chandler who left around 8:30 a.m. with the defendant driving and returned shortly after noon of the same day.

On that day the evidence tended to show that the defendant and Chandler went to the store of one J. H. "Pop" Jordan who operated the same near McAdenville, North Carolina. "Pop" Jordan's testimony indicated that he opened the store at approximately 10:00 a.m. and shortly thereafter he saw the red car with a white stripe down the side with two occupants seated therein. The occupants entered and he recognized one of the two as David Chandler who proceeded to try and sell Jordan a .22 caliber rifle but Jordan indicated that he did not need it and no purchase was made. Jordan's testimony further indicated that Chandler and the defendant after staying for

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awhile left his store about noon.

On that same day at about noon, one Homer Wright was leaving work on his way to lunch and was in the vicinity of Ben Stroupe's store in Ranlo, North Carolina. While parked on the street waiting for a light to change, he had occasion to see two men one of whom he identified as looking like the defendant in the vicinity of Ben Stroupe's store attempting to enter therein and being unable to do so. As the light changed he drove on and in so doing noticed a red car parked at the corner of the store and noting three numbers on the license plate - 388.

Also on August 2, 1974 a Mrs. Patricia Bingham was stopped at the intersection beside Ben Stroupe's store at a traffic light at about 12:15 p.m. when she saw two adult males, one of whom she testified looked like the defendant come out of the side of the Stroupe's store and leave in a red Chevrolet automobile, with a white stripe.

Later that afternoon at about 2:30 or 3:00, one Roy Franklin McGinnis arrived at the Smyre Gang Clubhouse. Chandler and the defendant were there and McGinnis saw them possessed with a large number of one dollar bills which they were attempting to change for larger bills purportedly to pay their rent. At that same time McGinnis noticed the defendant playing with a small caliber pistol. McGinnis was then persuaded by Chandler to drive Chandler to various banks in the City of Gastonia, North Carolina to cash certain checks that Chandler had in his possession. In addition, there was testimony indicating that two of these checks had been cashed by Ben Stroupe prior to the time he was killed.

The officers that arrived at the scene of the killing testified that they found Ben Stroupe in a back room of his store lying in a pile of newspapers and additional testimony was elicited indicating that he was shot with a .32 caliber bullet which caused his death.

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Later on the same afternoon, August 2, 1974 Paul Bledsoe was at the Smyre Gang Clubhouse and he saw the defendant with a .32 caliber pistol that would not fire. Shortly thereafter he saw the defendant attempt to hide the same in an old washing machine located somewhere behind the Clubhouse and he retrieved the pistol ostensibly for himself but later turned the same over to the authorities. The pistol was identified by police officers as having belonged to Ben Stroupe.

Donald Terry testified that late at night of August 2, 1974 the defendant came to his home where he sold Terry a .32 caliber hand gun that had three cartridges in it, two fired and one unfired. It was Terry's intention to sell the pistol but upon reading of the incident at Ben Stroupe's store in the newspaper later turned the pistol over to the authorities. This pistol was identified by ballistic experts as having been the murder weapon.

On the evening of August 3, 1974 the defendant was questioned at the Smyre Gang Clubhouse by police officers of the Ranlo police department, he could not be questioned because at that time he was intoxicated either by reason of the consumption of alcoholic beverages or by the injestion of narcotic drugs.

On August 4, 1974 the defendant was arrested, taken to the Ranlo police department where he was turned over to his probation officer, later taken to the Gaston County Jail, and later returned to the Ranlo police department where he was questioned by members of the State Bureau of Investigation. He made the following statement:

> "About four a.m. to 4:30 a.m. on Friday, August 2, 1974, I took some MDA by injecting it into myself with a needle and syringe. About twenty minutes before leaving the Smyre Gang Clubhouse at 7:30 that same morning, I snorted some acid . I had drunk beer all night on the preceding Thursday night. Arthur David Chandler, known to me as 'Monkey', and I left the Smyre Gang Clubhouse in a borrowed red Chevrolet Vega belonging to Harold Thomas Davis. 'Monkey' and I first traveled to 'Monkey's' home and obtained a .22 caliber rifle, a pack of cigarettes, and a coat. We next drove to the home of a friend, Chris Christopher who lives in Lowell; but he was not at home. 'Monkey' and I next traveled to Pop's, an establishment located in McAdenville. We arrived at Pop's about nine o'clock a.m. and remained there for about two to two-and-a-half hours playing the pinball machine and some poker.

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'Monkey' and I left Pop's and went to Ben Stroupe's store to get a PENTHOUSE magazine. When we arrived at Ben's place, I parked the car at the side entrance to the store and walked to the front door but could not get in that door. Ben Stroupe came to the side door, unlocked it, and let us inside. 'Monkey' and I had walked to the front of the store, but all we saw there were comic books. We asked Ben where the girlie books were located, and he showed us their location. I asked to buy a pack of Kool cigarettes, and Ben went behind the counter to get them. Ben handed me the Kools, and I paid him. I continued looking at the magazine until 'Monkey' said, "Let's go." Then, Ben aksed me to pay for the cigarettes, and I told him that I had already paid him. Ben pulled out a revolver from his right hip pocket, pointed the gun at me, and began cursing and raising hell. 'Monkey' told Ben to put the gun up. 'Monkey' grabbed Ben's gun. I don't know whether 'Monkey' went around or over the counter. I jumped over the counter and landed on top of 'Monkey' and Ben. The gun which was in Ben's hand went off. 'Monkey' got up. Ben got up, pointed the gun at me, pulled the trigger; and it snapped. Ben ran toward the rear room of the store. 'Monkey' took the gun away from Ben who was still wanting to fight. Ben moved out of my line of sight into a rear room. I could see 'Monkey's' back, but that was about all in that room. I heard another shot and just about flipped totally out. I didn't want to look in the back room, but I could see Ben's feet as he lay on the floor. I ran to the car and about left 'Monkey' behind. I did not know that he had taken anything from the store until later when we returned to the clubhouse. 'Monkey' and I pulled away from the store in the red Chevrolet Vega, turning to the right off of Cox Road and onto Highway 7. We pulled up right beside a police car in front of Ben's Place at this time. I was so afraid that I would not even look at the police car. Everything was mass confusion in my mind at this point. We returned to the clubhouse. 'Monkey' and I stayed at the clubhouse about ten minutes and drank some more beer. We decided to go back to Ben's place to wipe our fingerprints off anything we might have touched inside the store. When we arrived at the store, I could not make myself go inside. 'Monkey' went inside; and after he remained there for several minutes, I blew the car horn twice for him to come outside. He finally came out with about three paper bags. There were a few dollars in each of them. We left Ben's Place and traveled to the American Service Station located across from the Scottish Inn in Gastonia where we bought two dollars worth of gas and a case of Budweiser beer. We left this location and went to the Seven-Eleven Store located on New Hope Road near Stanley and Dallas. We bought another case of beer at this location and then returned to the clubhouse. I don't know what time it was when we returned. 'Monkey' and I stripped out the contents of the bags, which we had taken from Ben's Place and burned some of the papers which were in them. A man who was at the clubhouse whose name I don't know but who drives an exterminating truck took 'Monkey' to cash the checks which came from Ben's Place. When 'Monkey' returned from cashing the checks, he gave me some money and one check which he was unable to get cashed. I put the money and check in my back pocket. When I went to bed on Friday night, August 2, 1974, I put the money under the mattress under the bed in which I slept. On Saturday morning, August 3, 1974, I gave four hundred dollars in cash to a friend named Bill whose last name I do not know. Bill is also known to me as 'Pack'. I gave Bill the four hundred dollars because his girl friend needed an abortion. After giving

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the money to Bill, I had some cash left; but I don't know how much. I told my girl friend, Cherokee, after the incident at Ben's Place that 'Monkey' and I had shot Ben Stroupe and robbed him. She became very moody upon learning what we had done."

It was the defendant's contention that his statement was involuntary and cited cases therein to the Supreme Court of North Carolina. The defendant contended that if he was too intoxicated by reason of the consumption of alcoholic beverages or the injestion of narcotic drugs on Friday night, August 3, 1974, by his own statement, he would have been more intoxicated by reason of the consumption of same the following morning. In addition, the defendant contended that even if the defendant's statement was admitted into evidence the State was bound thereby and the statements therein that tended to expulcate the defendant of the crime should have bound the State thereby.

The defendant took the stand and his testimony closely followed the statement that he made to Agent Berrier. It showed that he and Chandler had gone to Stroupe's to look at girlie magazines particularly the PENTHOUSE ANNUAL. That he bought a pack of Kool cigarettes and as he and Chandler prepared to leave Stroupe accused him of not paying for the cigarettes. The defendant, Carter, responded that he had theretofore paid for the cigarettes at the time he purchased them, and Stroupe not believing him, pointed a gun at Carter, pulled a trigger but it did not fire. That he did not have a weapon on his person at the time but that he and Chandler dived over a counter onto Stroupe at which time the gun Stroupe had been holding hit the floor and fired. Stroupe then got up holding his chest and indicated that he was going to the back of the store to get another gun. The defendant then testified that Chandler followed Stroupe into the back and that he, the defendant, heard a shot and ran out the door and started the automobile and waited for Chandler. When Chandler emerged from Stroupe's store, he thereupon drove away. The defendant testified that he did not intend to rob or kill Ben Stroupe nor he, in fact, have anything to do with the shooting of Stroupe.

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REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT THE SENTENCE OF DEATH FOR THE CRIMES OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioner contends that his constitutional rights to due process of law and freedom from the infliction of cruel and unusual punishment have been violated. The petitioner also contends that the proper resolution of the constitutional question is of importance to himself in the case at hand and also to others who find themselves similarly situated as being required to stand trial for capital offenses in the State of North Carolina. Subsequent to the court's holding in Furman v. Georgia, 408 US 238, the North Carolina General Assembly modified North Carolina General Statute 14-17, which prior to its modification read as follows:

> Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death; Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's Prison and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

The North Carolina General Assembly modified the above statute in 1973 the amendment inserting "kidnapping" in the first setence and deleting, at the end of the first sentence, a former proviso authorizing the jury to recommend life imprisonment. The amendment also rewrote the second setnence so as to increase the maximum punishment for murder in the second degree from 30 years to life imprisonment. The 1973 amendatory act became effective April 8, 1974, and is applicable to all offenses thereafter committed, including the case at hand.

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Because this statute does not in any way alter North Carolina's capital procedure so as to limit or control the arbitrary and capricious infliction of the State's nominally mandatory death penalty, the Petitioner hereby reference incorporates the arguments and authorities contained at pages 26 through 140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, concerning the arbitrary infliction of the death penalty due to prosecutorial charging discretion, plea bargaining, jury discretion, and executive clemancy and the excessive cruelty of the death penalty.

This case exemplifies the freakish administration of the death penalty in North Carolina. The original co-defendant in this action, Arthur David Chandler, was tried at the February 4, 1976 Term of the Gaston County Superior Court in Case No. 74-CR-18319 and upon the same or very closely similar evidence, the jury found the defendant Not Guilty of Murder in the First Degree and Guilty to the Charge of Armed Robbery. A copy of the case on appeal to the North Carolina Court of Appeals filed February 4, 1976 is enclosed herewith and asked to be incorporated herein as if fully set out herein.

The punishment imposed on the two equally comparable defendants do not seem at all legally logical. Instead they illustrate the extralegal arbitrary administration of "mandatory" capital punishment as practiced in North Carolina and documented in the Fowler brief. The petitioner here contends that by reason of the modification in the statute by the North Carolina General Assembly after the decision in Furman the determination of whether the defendant should be subjected to a trial calling for mandatory death penalty or whether the defendant should be tried for second degree murder carrying with it the lighter penalty of life imprisonment was left by the State to the discretion of the District Attorney calling the case for trial. Justice Douglas indicated in the Furman case as follows:

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"In a Nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position..."

The petitioner realized that Justice Douglas was referring to discretion in the application of punishment after conviction, but contends that the modifications of the North Carolina General Assembly from a practical point of view shifted the discretion from the jury to the office of the District Attorney, and that this shifting of discretion was accomplished by increasing the maximum penalty for second degree murder from 30 years to life imprisonment and by making mandatory the death penalty for the conviction of first degree murder. The petitioner contends that he and others in a similar situation have been or are likely to be discriminated against by reason of their 'caste' or social and economic positions. The petitioner contends that the mandatory death penalty and other modifications to North Carolina General Statute 14-17 are pregnant with potentials for discriminations.

The North Carolina Legislature has manifestly followed the lead of the North Carolina Supreme Court in preserving procedures that invite juries to nullify the 'mandatory' death penalty in sympathetic cases. Codifying the rule of State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974), it is provided that defense counsel may inform the veniremen on Voir Dire that a death penalty will be imposed upon the return of a verdict of Guilty to a capital crime, may request the trial judge to instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty to a capital crime, and may in closing argument in a capital case "indicate the consequences of a verdict of guilty". The clear and inevitable result of these statutory provisions, as of the Britt rule is to invite de facto jury discretion which undercuts the imposition of the North Carolina's

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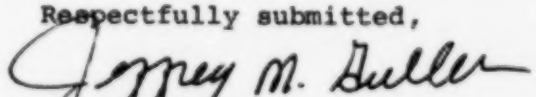
supposedly mandatory death penalty in a randomly and arbitrarily selected number of cases.

CONCLUSIONS

For the foregoing reasons, the petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



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SUPREME COURT OF NORTH CAROLINA FALL TERM 1975

STATE OF NORTH CAROLINA

v. 74-196 No. 54 - Gaston

TED LEMUEL CARTER

Appeal by defendant under G.S. 7A-27(a) from Ervin, J., at the 6 January 1975 Session of Gaston Superior Court.

Defendant was tried and convicted of the first degree murder and armed robbery of Benjamin Stroupe. The mandatory death sentence was imposed for the murder conviction. No sentence was imposed on the robbery conviction.

Evidence introduced by the State tends to show the following: On 30 July 1974 defendant, David "Monkey" Chandler (Chandler) and defendant's girl friend "Cherokee" visited the home of Milous Holland where defendant borrowed Holland's .32-caliber pistol, purportedly for protection in a poker game. On 2 August 1974, defendant and Chandler were at the Smyre Gang Clubhouse located near Spencer Mountain when Harold Davis arrived around 8:00 a.m. Davis loaned his 1973 red Vega with a white stripe down the side, license number BJZ-388, to defendant and Chandler who left around 8:30 a.m. with defendant driving and returned shortly after noon.

On 2 August 1974, J. E. "Pop" Jordan was operating a store near McAdenville. He opened the store at 10:00 a.m. that day. A few minutes later a red car with a white stripe down the side stopped out front and the two occupants of the car, Chandler and defendant, came in. Chandler wanted to sell Jordan a .22-caliber rifle but Jordan did not need it. Chandler and defendant stayed for a while, leaving around noon.

Around noon on 2 August 1974, Homer Wright was in the vicinity of Ben Stroupe's store in Ranlo. While waiting for the light to change at the intersection where Stroupe's store is located, he had occasion to see defendant and another man walk to the front door of the store and observed that they were unable to enter. As

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the light changed and he drove on, he saw a red car parked at the corner of the store. He noted three numbers on the license plate— 388.

On 2 August 1974, Mrs. Patricia Bingham was stopped at the intersection beside Ben Stroupe's store at about 12:15 p.m. when she saw two males, one being the defendant, come out of the side door of Stroupe's store and speed away in a red Vega with a white stripe.

Around 2:30 or 3:00 p.m. on 2 August 1974, Roy Franklin McGinnis arrived at the Smyrs Gang Clubhouse. Defendant and Chandler were already there, holding a large number of one dollar bills which they wanted to exchange for larger bills. At the time, defendant was also playing with a pistol. McGinnis then drove Chandler to various stores and banks where Chandler attempted to cash payroll checks that had already been endorsed with different signatures. Two of these checks had been cashed by Ben Stroupe the night before the killing.

Various law enforcement officers testified that Ben Stroupe's body was found in a pile of newspapers in the store and that death occurred from two .32-caliber bullet wounds in the chest.

Late in the afternoon of 2 August 1974, Paul Bledsoe was at the Smyrs Clubhouse where he saw defendant with a .32-caliber pistol that would not fire. Shortly thereafter, defendant was seen hiding the pistol inside an old washing machine behind the clubhouse. Bledsoe retrieved this pistol and later turned it over to the authorities. The pistol was identified as that owned by Ben Stroupe.

Later in the evening of 2 August 1974, defendant was at the home of Donald Terry where he sold Terry a .32-caliber handgun with three cartridges in it, two fired and one unfired. Terry had planned to sell the pistol, but after reading of Mr. Stroupe's death turned it over to the authorities in Ranlo. This pistol was later identified as the murder weapon.

On 4 August 1974, defendant made a statement to J. G. Berrier, an agent of the State Bureau of Investigation, as follows:

"About four A.M. to 4:30 A.M. on Friday, August 2, 1974, I took some MDA by injecting it into myself with a needle and syringe. About twenty minutes before leaving the Smyre Gang Clubhouse at 7:30 that same morning, I snorted some acid. I had drunk beer all night on the preceding Thursday night. Arthur David Chandler, known to me as 'Monkey', and I left the Smyre Gang Clubhouse in a borrowed red Chevrolet Vega belonging to Harold Thomas Davis. 'Monkey' and I first traveled to 'Monkey's' home and obtained a .22 caliber rifle, a pack of cigarettes, and a coat. We next drove to the home of a friend, Chris Christopher who lives in Lowell; but he was not at home. 'Monkey' and I next traveled to Pop's, an establishment located in McAdenville. We arrived at Pop's about nine o'clock a.m. and remained there for about two to two-and-a-half hours playing the pinball machine and some poker. 'Monkey' and I left Pop's and went to Ben Stroupe's store to get a PENTHOUSE magazine. When we arrived at Ben's place, I parked the car at the side entrance to the store and walked to the front door but could not get in that door. Ben Stroupe came to the side door, unlocked it, and let us inside. 'Monkey' and I had walked to the front of the store, but all we saw there were comic books. We asked Ben where the girlie books were located, and he showed us their location. I asked to buy a pack of Kool cigarettes, and Ben went behind the counter to get them. Ben handed me the Kools, and I paid him. I continued looking at the magazine until 'Monkey' said, "Let's go." Then, Ben asked me to pay for the cigarettes, and I told him that I had already paid him. Ben pulled out a revolver from his right hip pocket, pointed the gun at me, and began cursing and raising hell. 'Monkey' told Ben to put the gun up. 'Monkey' grabbed Ben's gun. I don't know whether 'Monkey' went around or over the counter. I jumped over the counter and landed on top of 'Monkey' and Ben. The gun which was in Ben's hand went off. 'Monkey' got up. Ben got up, pointed the gun at me, pulled the trigger; and it snapped. Ben ran toward the rear room of the store. 'Monkey' took the gun away from Ben who was still wanting to fight. Ben moved out of my line of sight into a rear room. I could see 'Monkey's' back, but that was about all in that room. I heard another shot and just about flipped totally out. I didn't want to look in the back room, but I could see Ben's feet as he lay on the floor. I ran to the car and about left 'Monkey' behind. I did not know that he had taken anything from the store until later when we returned to the clubhouse. 'Monkey' and I pulled away from the store in the red Chevrolet Vega, turning to the right off of Cox Road and onto Highway 7. We pulled up right beside a police car in front of Ben's Place at this time. I was so afraid that I would not even look at the police car. Everything was mass confusion in my mind at this point. We returned to the clubhouse. 'Monkey' and I stayed at the clubhouse about ten minutes and drank some more beer. We decided to go back to Ben's Place to wipe our fingerprints off anything we might have touched inside the store. When we arrived at

the store, I could not make myself go inside. 'Monkey' went inside; and after he remained there for several minutes, I blew the car horn twice for him to come outside. He finally came out with about three paper bags. There were a few dollars in each of them. We left Ben's Place and traveled to the American Service Station located across from the Scottish Inn in Gastonia where we bought two dollars worth of gas and a case of Budweiser beer. We left this location and went to the Seven-Eleven Store located on New Hope Road near Stanley and Dallas. We bought another case of beer at this location and then returned to the clubhouse. I don't know what time it was when we returned. 'Monkey' and I stripped out the contents of the bags, which we had taken from Ben's Place and burned some of the papers which were in them. A man who was at the clubhouse whose name I don't know but who drives an exterminating truck took 'Monkey' to cash the checks which came from Ben's Place. When 'Monkey' returned from cashing the checks, he gave me some money and one check which he was unable to get cashed. I put the money and check in my back pocket. When I went to bed on Friday night, August 2, 1974, I put the money under the mattress under the bed in which I slept. On Saturday morning, August 3, 1974, I gave four hundred dollars in cash to a friend named Bill whose last name I do not know. Bill is also known to me as 'Pack'. I gave Bill the four hundred dollars because his girl friend needed an abortion. After giving the money to Bill, I had some cash left; but I don't know how much. I told my girl friend, Cherokee, after the incident at Ben's Place that 'Monkey' and I had shot Ben Stroupe and robbed him. She became very moody upon learning what we had done."

Defendant took the stand and his testimony, which closely followed the statement given by him to Agent Barrier, tended to show that he and Chandler had gone to Stroupe's to look at girlie magazines, particularly The Penthouse Annual. He bought a pack of cigarettes and as they prepared to leave, Stroupe accused him of not paying for the cigarettes and pointed a gun at them but it did not fire. Defendant did not have a weapon but dived over the counter onto Stroupe at which time the gun Stroupe had been holding hit the floor and fired. Stroupe got up, holding his chest and said he was going into the back room to get another gun. Chandler followed Stroupe and defendant heard another shot, ran out the door and started the car, waiting for Chandler. He did not intend to rob or kill Ben Stroupe and did not know how he ended up with the cash and checks. He did tell his girl friend Cherokee that he and Chandler had robbed and killed Ben Stroupe.

Further facts pertinent to decision will be discussed in the opinion.

Attorney General RUFUS L. [illegible]STEN by Special Deputy Attorney General WILLIAM F. O'CONNELL for the State.

JEFFREY M. GULLER for defendant appellant.

MOORE, Justice.

Defendant first contends that the trial court erred in overruling his motion to strike the testimony of Homer Wright and to suppress the testimony of Fred Hurst, and in allowing the introduction of certain photographs. The record discloses that a district court judge and Superior Court Judge Grist entered orders directing the State to make available to defendant, among other information, a list of all prospective witnesses for the State and any tangible evidence that might be used against him.

The trial judge, upon hearing defendant's motion, found that no photographs had been made available to defendant, that the name of the witness Homer Wright had not been disclosed to defendant but was on file with the clerk of court as a subpoenaed witness, and that the name of witness Fred Hurst had appeard on a firearms report furnished to defendant. Judge Ervin then ruled that the disclosure orders did not clearly indicate that the photographs should be furnished, but if they were included within the scope of the orders they were only competent to <u>illustrate</u> the witness's testimony, and that defendant was not prejudiced by their use. Concerning the testimony of Fred Hurst, Judge Ervin ruled that defense counsel's possession of Hurst's signed report provided him with sufficient notice of Hurst's testimony but any additional documents relating to Mr. Hurst should be made available to defendant prior to Mr. Hurst's testimony. The court ruled further that the testimony of Homer Wright was essentially cumulative to the statement of Patricia Bingham which had been provided defendant.

No right of discovery in criminal cases existed at common law. State v. Davis, 282 N.C. 107, 191 S.E. 2d 664 (1972); State v. Goldberg, 261 N.C. 181, 134 S.E. 2d 334 (1964), cert. den. 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). Therefore, absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him. State v. Hoffman, 281 N.C. 727, 190 S.E. 2d 842 (1972). Neither former G.S. 15-155.4 nor new G.S. 15A-903 requires this. Here, however, as in Hoffman, an order to supply defendant with certain information had been issued and the State had purported to comply with it. No evidence of bad faith on the part of the State is shown. See State v. Lampkins, 286 N.C. 497, 212 S.E. 2d 106 (1975). Thus, the question presented is whether the omission of the names of Homer Wright and Fred Hurst prejudiced defendant and deprived him of a fair trial. The trial court held not. We agree. Permitting these witnesses to testify and accepting the photographs into evidence were matters within the discretion of the trial judge, not reviewable on appeal in the absence of a showing of an abuse of discretion. State v. Carey, 285 N.C. 509, 206 S.E. 2d 222 (1974); State v. Hoffman, supra. See also State v. Anderson, 281 N.C. 261, 188 S.E. 2d 336 (1972). No such abuse of discretion is shown. This assignment is overruled.

Defendant next assigns as error the refusal of the trial court to grant his motion to dismiss based on double jeopardy. This trial began on 6 January 1975 with a jury being empaneled, pleas entered, and certain testimony heard. On 8 January 1975, it was determined that one of the State's witnesses, Mr. Fred Hurst, was undergoing surgery and would be unable to testify until the next week. It appears that the district attorney was aware at the trial's inception that this witness was having minor surgery but had been assured that he would be available to testify on either 8 or 9 January.

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The trial was then recessed until the next week, the second week of the same session, with the jury being recalled on 15 January. Defendant concedes that the jury was well instructed prior to the temporary recess and questioned upon their return concerning any preconceptions or conclusions they might have reached. Defendant did not object at the time the recess was ordered but before resumption of the trial on 15 January, defendant did object on the ground that if the trial were resumed defendant would be placed twice in jeopardy for the same offense. Jeopardy attaches when a defendant in a criminal prosecution is placed on trial (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. State v. Neas, 278 N.C. 506, 180 S.E. 2d 12 (1971); State v. Birckhead, 256 N.C. 494, 124 S.E. 2d 838 (1962); State v. Crocker, 239 N.C. 446, 80 S.E. 2d 243 (1954); 2 Strong, N. C. Index 2d, Criminal Law § 26, p. 516. Defendant, in support of this position, relies upon two federal cases and one North Carolina Court of Appeals case. Downum v. United States, 372 U.S. 734, 10 L.Ed. 2d 100, 83 S.Ct. 1033 (1963), and Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), each involved a situation wherein a jury was empaneled but then discharged prior to completion of the first trial and the defendant was then brought to trial at a later date before a newly empaneled and different jury. State v. Coats, 17 N.C. App. 407, 194 S.E. 2d 366 (1973), involved a defendant who was charged with drunken driving and brought to trial for the first time in district court. During the trial, the case was continued until a later date in order to give the district attorney time to subpoena an additional witness. At the second trial in the district court, apparently the trial was begun anew with the defendant again entering pleas, etc. These three cases are distinguishable from the case at bar, and the proceedings in them were understandably held to amount

to double jeopardy. The simple answer to defendant's contention in present case is that he was not subjected to double jeopardy because he was only subjected to one trial. Here, there was merely a temporary interruption of the trial based upon the unexpected inability of a scheduled witness to be present due to his physical condition. This interruption did not deprive the defendant of his right to a speedy trial, did not cause any arbitrary or oppressive delay and did not handicap the defendant in the presentation of his case. The course and conduct of a trial are matters largely within the discretion of the trial court. See State v. Cavallaro, 274 N.C. 480, 164 S.E. 2d 168 (1968); Shute v. Fisher, 270 N.C. 247, 154 S.E. 2d 75 (1967); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E. 2d 114 (1958). No prejudice to defendant and no abuse of discretion by the court is shown. This assignment is overruled.

The trial court admitted into evidence the statement made by defendant to Agent Berrier concerning the shooting. Defendant contends that its admission was error and, further, that the trial court's findings of fact and conclusions of law were not entered into the record at the proper time. An extensive voir dire hearing was conducted immediately prior to the temporary recess on 8 January. The findings of fact and conclusions of law are in the record dated 15 January, the date the trial resumed. It is true, as defendant contends, that in State v. Doss, 279 N.C. 413, 183 S.E. 2d 671 (1971), this Court indicated that it was the better practice to make the findings of fact and conclusions of law at some time during the trial, and preferably at the time the statement is tendered and before it is admitted. In this case, prior to entering the order, the trial judge announced that he would permit the State to offer the statement into evidence and said that he would give the reporter his findings of fact and conclusions of law in writing and put them into the record at the proper time. We find nothing wrong with this procedure and see no prejudice to defendant.

Defendant strenuously contends, however, that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any statement involuntary.

After an extensive voir dire hearing, the trial court found, in part, that on Friday evening, 2 August 1974, defendant was drunk and was not interrogated at that time because Chief Trull did not believe that he was in condition to be questioned; that on Saturday morning, between 9:00 and 9:30 a.m., 3 August, defendant was in good shape and was not under the influence of intoxicating liquors or drugs; that defendant was not in custody at the time and was allowed to go across the street where he bought some crackers, cookies and a quart of chocolate milk; that on Saturday afternoon defendant was taken to a burger barn where he got some hot dogs and french fries, later took a nap for about one hour, and that throughout the evening he was supplied with cigarettes, food and coffee by the officers; that when the defendant was first questioned, Agent Berrier read him his rights verbatim from a printed form, that he gave defendant a copy of this form and that after his rights were read to him defendant read and signed the waiver of rights; that beginning about 9:00 or 9:30 p.m. and before questioning, Agent Berrier again read defendant his rights and defendant again signed a waiver of rights; that defendant was questioned in all for a total of two hours; that the defendant is twenty-five years old; that he completed the eleventh grade in high school, dropping out his senior year, but that he subsequently obtained a high school diploma by taking the GED examination, and that he also successfully completed a correspondence course in drafting and plan reading and qualified as a union carpenter by passing a written examination; and that he affirmatively and knowingly waived his right to have an attorney present during questioning. These findings of fact were amply supported by competent evidence, and so supported are binding on

appeal. State v. Thompson, 287 N.C. 383, 214 S.E. 2d 742 (1975); State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92 (1975); State v. Bishop; State v. Baskin; State v. Thompson; State v. McCain, 272 N.C. 283, 158 S.E. 2d 511 (1968). Based upon the findings of fact, the court concluded that defendant was fully advised of his rights in accordance with the Miranda warnings, and that the statements made by the defendant were freely, understandingly and voluntarily made and were not induced by any coercion, duress, threats, undue influence or promises of leniency. We agree with the trial judge's conclusions that the pretrial statement was freely, understandingly and voluntarily made and was therefore properly admitted into evidence.

Defendant next assigns as error the denial of his motion for judgment as of nonsuit. Specifically, he contends that he comes within the purview of the rule stated in State v. Bolin, 281 N.C. 415, 189 S.E. 2d 235 (1972), that "'[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements.' State v. Carter, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), and cases cited. [Citations omitted.]" However, it is equally well established that the introduction by the State of an exculpatory statement made by the defendant does not preclude the State from showing that the facts concerning the crime were different. State v. Bolin, supra; State v. Cooper, 273 N.C. 51, 159 S.E. 2d 305 (1968); State v. Bright, 237 N.C. 475, 74 S.E. 2d 407 (1953). On motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. State v. Bolin, supra; State v. Murphy, 280 N.C. 1, 184 S.E. 2d 845 (1971); State v. Cutler, 271 N.C. 379, 156 S.E. 2d 679 (1967).

When the evidence in this case is so considered, the jury could find the following facts despite certain statements to the

contrary by defendant:

(1) Defendant borrowed the murder weapon on Tuesday, 30 July 1974.

(2) Defendant had possession of the murder weapon and the victim's weapon on the afternoon of 2 August 1974 when he was seen hiding them in an old washing machine behind the clubhouse.

(3) Defendant sent his girl friend Cherokee to retrieve the murder weapon from its hiding place in order to sell it to Donald Terry. Terry, upon cleaning the pistol, found that it had been fired twice.

(4) Defendant had asked one Bill Pack a few days before the shooting to help him rob "Pop's" and another store in McAdenville but Pack refused.

(5) Defendant and Chandler were in possession of several hundred dollars on the afternoon of 2 August 1974 and several payroll checks that had already been endorsed, at least two of which were identified as having been cashed at Stroupe's Place the night before the shooting.

(6) Defendant admitted telling his girl friend Cherokee that he and Chandler had "killed and robbed Ben Stroupe."

We find the evidence presented by the State sufficient to carry the case to the jury on the murder charge contained in the bill of indictment. Defendant's motions for judgment as of nonsuit were properly denied.

Defendant's final contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected by this Court in many recent decisions, including State v. Robbins, 287 N.C. 483, 214 S.E. 2d 756 (1975); State v. Stegmann, 286 N.C. 638, 213 S.E. 2d 262 (1975); State v. Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974); State v. Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974); State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). We adhere to those decisions.

Our careful search of this entire record discloses no error warranting a new trial.

No Error.

~~EXHIBIT~~ "B"

No. 7527SC624

NORTH CAROLINA COURT OF APPEALS

Filed: 4 February 1976

STATE OF NORTH CAROLINA

V.

Gaston County
No. 74CR18319

ARTHUR DAVID CHANDLER

Appeal by defendant from Ervin, Judge. Judgment entered 13 March 1975 in Superior Court, Gaston County. Heard in the Court of Appeals 12 November 1975.

Defendant was charged in a bill of indictment with first degree murder and with armed robbery.

The evidence tends to show that Milous Holland saw Ted Carter with David Chandler on 30 July 1974. At that time, Holland loaned Carter his loaded .32 caliber pistol. Holland next saw his pistol at the police station.

Harold Thomas Davis saw the defendant on 2 August 1972 at the Smyre Gang Clubhouse near Spencer Mountain. Upon the request of the defendant, Davis loaned his 1973 red Vega to Chandler. Carter left in the vehicle with Chandler around 8:30 a.m. and returned around 12:00 noon. The two borrowed the car a second time that afternoon for about twenty minutes.

J. H. Jordan was in his place of business, Roberson's Place, on 2 August 1974 when two persons parked in the front of the store in a red Vega and sat there talking. Jordan identified the two as Chandler and Carter. Chandler tried to sell Jordan an old model rifle, but Jordan was not interested. The two left the store around 12:00 noon.

Homer Wright identified the defendant and Carter as the men he saw knocking on the door of Ben Stroup's store on 2 August 1974 between 11:45 and 12:00 noon. A red Vega was parked out front at that time.

On 2 August 1972 at around 12:30 p.m., Patricia Bingham saw two men hurriedly leaving the side door of Ben Stroup's store. She identified the defendant as the one of these two men who got into the

passenger side of the automobile.

Around 2:30 or 3:00 o'clock on 2 August 1974, Roy Franklin McGinnis saw Carter and the defendant at the Smyre Gang Clubhouse. The defendant promised McGinnis a six-pack of beer if he would drive him to the bank. Defendant had several checks which he finally was able to cash after being driven around to several banks by McGinnis. While driving around, defendant showed McGinnis a roll of money.

When Joel Brent Plainer entered Stroup's store on 2 August 1974 at about 3:45, he found Stroup lying in a puddle of his own blood.

Stroup was dead when he was examined by the coroner at about 4:25 that same day.

In the opinion of Dr. E. M. Kelman, Stroup died from a .32 caliber bullet wound.

After the voir dire hearing during which police officers J. G. Berrier, Larry Hardin, and Doyle Trull testified, the court made findings of fact from which he concluded as a matter of law the following:

> "1. That the defendant was adequately and properly advised of his constitutional rights in accordance with the decision of the United States Supreme Court in the case of MIRANDA v. ARIZONA;
>
> 2. That the defendant understood his constitutional rights and knowingly and understandingly waived his rights at the time of each interrogation; that the defendant also affirmatively waived his right to a lawyer at the time of each and every interrogation;
>
> 3. That the defendant's statement is not a result of any improper or unlawful promises or improper threats or coercion on the part of any of the questioning officers.
>
> 4. That the State, if it so desires, will be permitted to offer in evidence in the trial of this case the statement made by the defendant to Agent Berrier on Saturday night, August 3, 1974, and reduced to writing on the early morning of Sunday, August 3 [sic], 1974."

In the statement made by defendant to Officer Berrier after waiving his rights, the defendant admitted that he and Carter entered Stroup's store to buy some magazines between 11:30 and 12:00 noon on 2 August 1974 after taking the drug, MDA, for several days and after having consumed about six or seven beers each. Carter asked Stroup

for a pack of cigarettes. Stroup and Carter began arguing about whether Carter had paid for the cigarettes. Stroup pulled out his revolver from his right hip pocket and pointed it at Carter. As Stroup cocked the gun, the defendant grabbed Stroup's hand and pointed the gun toward Stroup. The gun went off and the shot struck Stroup in the upper right portion of his chest. Stroup moved to the back of the store and raised the gun at both the defendant and Carter. The defendant kicked the gun from Stroup's hand and shot Stroup in the shoulder. The defendant threw the gun on Stroup's body, and grabbed up some payroll checks. The two left Stroup's store, but returned a short while later to look for some money. The defendant found $50 to $60, and the two returned to the Smyre Gang Clubhouse after purchasing a case of beer. The defendant then had a man named Roy drive him around to several banks in order to cash the checks which were stolen from Stroup's store.

The police officers did not find Stroup's gun in his store. Stroup's gun was turned over to the police by Paul Bledsoe. Bledsoe took Stroup's gun, intending to steal it, from a place where Carter had hidden it. Bledsoe never saw the gun in the defendant's possession. Stroup's gun was labeled State's Exhibit No. 11. The court found Frederick Mark Hurst, Jr., to be an expert in the field of firearms and tool mark identification. Hurst testified that in his opinion, neither State's Exhibit No. 9 nor No. 10, (the bullets from Stroup's body), was fired in State's Exhibit No. 11. He was unable to determine conclusively whether State's No. 10 was fired from State's Exhibit No. 1, (the gun borrowed from Milous Holland). However, Hurst did testify that in his opinion, State's Exhibit No. 9 was fired from State's Exhibit No. 1.

Defendant testified in his own behalf. He testified that he was in Stroup's store with Carter on 2 August 1974, but that he was in the car when the shooting occurred. He testified that Carter came out of the store and got into the car after the shooting saying that Stroup had tried to kill him and therefore he (Carter) had to shoot Stroup. Carter then laid State's Exhibit No. 1 on the seat of the car.

According to defendant, this was the first time he saw the gun. Further, he said that the money and the checks were taken by Carter alone. He said that he went back to the store a short while later to see if Stroup was dead. After checking his pulse, he took Stroup's gun from his right hand, and then left the store a second time. Because he was afraid of Carter, he attempted to cash the checks Carter stole from Stroup. The defendant identified State's Exhibit No. 11 as the gun he removed from Stroup's hand. He said that at the time he made his statement to the officers, that he ". . . was messed up on M.D.A."

The jury found the defendant not guilty of murder in the first degree. From a verdict of guilty of the charge of armed robbery, defendant appealed.

Attorney General Edmisten, by Associate Attorney Archie W. Anders and Associate Attorney Wilton E. Ragland, Jr., for the State.

Harris and Bumgardner, by Tim L. Harris and Don H. Bumgardner, for defendant appellant.

MARTIN, Judge.

Defendant contends that the court committed error by denying defendant's motion to strike the statement made by Officer Trull concerning a radio call he received. The officer testified that he went to Mr. Stroup's store on 2 August 1972 as a result of a call he received. He said, "I received a call on the radio at 3:20 that there has been a robbery-shooting at Ben Stroup's. . . ." Defendant contends that this statement constituted hearsay and prejudicial error. We disagree. The statement was not made to prove the truth of the matter asserted, that is, that there had been a robbery shooting, but rather to explain his presence and time of arrival on the scene. Thus, the statement is not objectionable as hearsay. State v. Crump, 277 N.C. 573, 178 S.E. 2d 366 (1971). This assignment of error is overruled.

Defendant further contends that the court erred in refusing to grant nonsuit at the close of all the evidence as to the armed robbery charge. Upon a motion being made for nonsuit by defendant, the

trial judge must consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. State v. Vincent, 278 N.C. 63, 178 S.E. 2d 608 (1971). "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." State v. Goines, 273 N.C. 509, 160 S.E. 2d 469 (1968). In the present case, there was evidence from which the jury could find that the offense charged had been committed in that the defendant admitted, in his statement to Officer Berrier, removing some checks from the premises immediately after shooting Stroup. Further, the State's evidence shows that defendant and Carter were at Holland's house a few days before the shooting when Carter borrowed a .32 caliber pistol from Holland which was identified as the one with which Stroup was shot. The court is not concerned in a motion to nonsuit with the weight of the testimony, but only with its sufficiency to carry the case to the jury and to sustain the indictment. State v. Primes, 275 N.C. 61, 165 S.E. 2d 225 (1969). When tested by these principles there is abundant evidence to carry the case to the jury. The motion for compulsory nonsuit was properly denied.

Defendant also contends that the court erred in its charge to the jury as to conspiracy when defendant was not charged with conspiracy and when there was no evidence presented as to a conspiracy. The trial judge instructed the jury as follows:

> "Now, the defendant in this case is not charged with the offense of conspiracy, but I think in order for you to understand these instructions, it is necessary for me to tell you what is meant by the term 'conspiracy'."

While we deem any instruction on conspiracy in this case to be unnecessary we find that no prejudicial error was committed by the trial judge since he very clearly instructed the jury that the defendant was charged with two separate criminal offenses, first degree murder and armed robbery. This assignment of error is overruled.

We have considered defendant's remaining assignments of error and find them to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

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~~THEODORE O. BROWN, JR.~~
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
BY Pattie P. Barber
DEPUTY CLERK
February 6, 1976

APPENDIX C

intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life-or-death decisions. (*See* Part II, pp. 26-101 *infra.*) Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing – that the death penalty is no longer "widely accepted,"[32] but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing between life and death as the disposition for even the most heinous of offenders (*see* Part III, pp. 102-140 *infra*) – is to be ignored, as though it never happened. With all respect, this result is heedless of *Furman*, heedless of reality and history, and forbidden by the Eighth and Fourteenth Amendments.

II.

THE ARBITRARY INFLICTION OF DEATH

Although the prevailing *Furman* opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic

[32] *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

selective processes.[33] *Furman* thus accords contemporary recognition to a central historic concern of the

[33] The concurring opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-373) shared the view that the death penalty is unconstitutional *per se* regardless of the presence or absence of selectivity in the procedural system through which it is administered.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional" if it were in fact applied wholly non-selectively, 408 U.S. at 257, but held the death sentences under review in *Furman* and companion cases incompatible "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," *ibid.*, because they were "imposed pursuant to a procedure that gives room for the play of . . . prejudices," 408 U.S. at 242, and allows the application of capital punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U.S. at 245.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question" whether "the infliction of the death penalty is constitutionally impermissible in all circumstances," 408 U.S. at 306, since he found that the death sentences under review were returned "under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore violated the Eighth and Fourteenth Amendments. "[O]f all of the people convicted of rapes and murders . . ., many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote ommitted).

Mr. Justice White declined to consider the question whether "the death penalty is unconstitutional *per se*," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

Eighth Amendment: "that government by the people, instituted by the Constitution, ... not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910).

As this Court has recognized,[34] the Cruel and Unusual Punishments Clause of the Eighth Amendment is derived from the almost identically worded Tenth Clause of the English Bill of Rights of 1689.[35] The preamble to the Bill of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament."[36] The first two Clauses accordingly declared such conduct on the part of the King and the royal

[34] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[35] Modern historical scholarship lends support to this conclusion. *See* SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971). The "Declaration of Rights," which William and Mary signed on February 13, 1689, before their coronation, was reenacted with minor additions as a statute (the "Bill of Rights") by Parliament later that year. 1 W. & M., sess. 2, ch. 2 (1689), VI STAT. OF THE REALM 142-145. *See also* 5 PARL. HIST. ENG. 483-490 (1688-1704) (Cobbett ed. 1809); BROWNING, ENGLISH HISTORIC DOCUMENTS 1660-1714 122-128 (1953); BAXTER, BASIC DOCUMENTS OF ENGLISH HISTORY 159 (1968). Clause 10 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[36] Of particular concern to Parliament was James II's claim that the royal prerogative authorized him to ignore the statutes prescribing religious qualifications for the holding of public office, 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 87, 89 (1938), and to imprison subjects when no statute or common law principle authorized such a punishment, 2 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 515 (1850). This royal claim was facilitated by the 1686 decision of the King's Bench in *Godden v. Hales*, 2 Show. K.B. 475, 89 Eng. Rep. 1050, 11 Howell St. Tr. 1197 (Trinity Term, 2 Jac. 2) (1686), a collusive action arranged by James II before handpicked judges to secure judicial approval of the royal power arbitrarily to disregard the enactments of Parliament. KENYON, THE STUART CONSTITUTION, 1603-1688 420-426 (1966). The Court ruled: "That the laws of England are the King's laws, That therefore it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases and upon particular reasons, That of those reasons and those necessities the King himself is the sole judge." 11 Howell St. Tr. at 1199. This decision confirmed the Parliamentary belief "that the Crown must be limited, controlled, and [made] inferior to the laws of the land," HUGHES & FRIES, CROWN AND PARLIAMENT IN TUDOR–STUART ENGLAND 291 (1959); the realization by both Whigs and Tories "of the inadequacy of the laws of Parliament to withstand the attacks of the King was the beginning of their rejection of James and the real commencement of the revolution of 1688." *Id.* at 294.

judges illegal,[37] and Clause 10 prohibited the infliction of "cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the infliction of harsh punishments that were arbitrarily imposed.[38]

While the Bill of Rights was pending in Parliament, an Anglican clergyman, Titus Oates, appealed his 1685 perjury conviction to the House of Lords. Oates had

[37] These two Clauses flatly overruled *Godden v. Hales*, *supra* note 36, declaring:

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). A significant new phrase was also added to the Coronation Oath: henceforth, the ascending monarch was to swear to govern according to "the statutes in Parliament agreed upon, and the laws and customs of the same." WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY 3, 37 (1960). "The oath in its previous form had pledged the King to 'grant and keep' the laws and customs 'granted' by his predecessor. If the laws were merely the King's grants, then it might be contended that he could revoke them. Henceforth, it was plain that he was bound by the laws." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 176-177 (1938).

[38] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 859 (1969); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 844 (1972).

been convicted in the King's Bench of giving false testimony during the "Popish Plot" trials of 1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year.[39] This punishment was harsh,[40] discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.[41]

[39] For discussions of this phase of the *Oates* case, see CLARK, THE LATER STUARTS, 1660-1714 88-92 (1934); BROWNING, ENGLISH HISTORICAL DOCUMENTS, 1660-1714 12-15 (1953); 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 61-65 (1938); LANDON, THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689 181-183 (1969).

[40] The lengthy flogging prescribed for Oates was apparently intended to be fatal: "the court, having no power to hang him, plainly intended that he should be flogged to death." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642-1801 142 (1938). This was the contemporary understanding of the court's intent. In 1689, the House of Commons resolved "[t]hat it was illegal, cruel, and of dangerous example that a freeman [Oates] should be whipped in such a barbarous manner, as, in all probability, would determine in death." 5 PARL. HIST. ENG. 387 (1688-1704) (Cobbett ed. 1809).

[41] Imprisonment for life could not at that time be imposed for perjury (a misdemeanor), 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1660-1801 142 (1938); and "[o]nly a spiritual court could degrade a priest," *ibid.* According to Macaulay, "that the sentence [imposed on Oates] was illegal was a proposition that admitted of no dispute." 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 308 (1850).

Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the Members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration [of Rights] of the 12th of Feb. last . . . whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted."[42] Oates

[42] 5 PARL. HIST. ENG. 291-292 (1688-1704) (Cobbett ed. 1809). This dissent declared:

> "1. 'For that the King's-bench, being a temporal court, made it part of the Judgment, That Titus Oates, being a clerk, should, for his perjuries, be divested of his canonical and priestly habit, and to continue divested all his life: which is a matter wholly out of their power, belonging to the ecclesiastical courts only. 2. For that the said Judgments are barbarous, inhuman, and unchristian. And there is no precedents [sic] to warrant the punishments of whipping, and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him . . . 4. For that this will be an encouragement, and an allowance, for giving the like cruel, barbarous, and illegal Judgments hereafter, unless this Judgment be reversed. 5. Because sir John Holt, sir Henry Pollexfen, the two Chief Justices, and sir Robert Atkins chief baron, with six Judges more (being all that were then present), for these and many other Reasons, did, before us, solemnly deliver their Opinions; and unanimously declare, That the said Judgments were contrary to law, and ancient practice; and therefore erroneous, and ought to be reversed. 6. Because it was contrary to the Declaration of the 12th of Feb. last, which was ordered by the lords spiritual and temporal, and commons, then assembled; and by their Declaration ingrossed in parchment, and inrolled among the Records of parliament, and recorded in Chancery; whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.' "

then sought relief in the House of Commons, where his cause was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates . . . as cruel and illegal."[43] Sir William Williams declared during the debate on this bill: "let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary, and hereafter the Judges may be most injurious in punishing."[44] When a deadlock occurred with the House of Lords over a collateral matter,[45] one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A Member of Commons responded:

> " 'Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by

[43] 5 PARL. HIST. ENG. 296 (1688-1704)(Cobbett ed. 1809).

[44] *Id.* at 294.

[45] The Commons had also declared that the perjury judgements against Oates were "corrupt." 5 PARL. HIST. ENG. 392 (1688-1704) (Cobbett ed. 1809), and it was this allegation that the Lords would not agree to. *Id.* at 394.

law, and not by the arbitrary discretion of any tribunal.' "[46]

By the time of the framing of the American Bill of Rights, eight States had adopted prohibitions of "cruel and unusual punishments" that were modeled upon

[46]3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850). The floor managers of the Commons bill reported back to the House of Commons on their difficulties in securing an acceptable compromise bill from the House of Lords:

> "the commons had hoped, that, after the Declaration [of Rights] presented to their majesties upon their accepting the crown (wherein their lordships had joined with the commons in complaining of the cruel and illegal punishments of the last reign; and in asserting it to be the ancient right of the people of England, that they should not be subjected to cruel and unusual punishments; and that no judgments to the prejudice of the people in that kind ought in any-wise to be drawn into consequence, or example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the lords had agreed to; they should not have seen Judgments of this nature affirmed, and been put under a necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious consequence to the people, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the meaning of those Declarations—That the commons had a particular regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, that they are erroneous, cruel, illegal, and of ill example to future ages. . . . That it was surely of ill example for a temporal court to give judgment, 'That a clerk be divested of his canonical habits; and continue so divested during his life.' That it was of ill example, and illegal, that a Judgment of perpetual imprisonment should be given in a case, where there is no express law to warrant it."

5 PARL. HIST. ENG. 386-387 (1688-1704) (Cobbett ed. 1809). Oates was pardoned by King William before the differences between Commons and Lords were finally resolved. *Id.* at 399.

Clause 10 of the English Bill of Rights,[47] and the federal government had inserted a similar provision into the Northwest Ordinance of 1787.[48] Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended.[49] However, whatever else such clauses were

[47]Virginia Constitution of 1776, Declaration of Rights, §9 (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909); (*see also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS OF 1791 35-36, 232 (1955)); Delaware Declaration of Rights of 1776, §16 (1 Del. Code Ann. §83 (1953)); North Carolina Constitution of 1776, §10 (5 THORPE, *supra*, at 2788); Maryland Constitution of 1776, §22 (3 THORPE, *supra*, at 1688); Massachusetts Constitution of 1780, art. 26 (3 THORPE, *supra*, at 1892); New Hampshire Constitution of 1784, §33 (4 THORPE, *supra*, at 2457); Pennsylvania Constitution of 1790, art. 9, §13 ("... nor cruel punishments inflicted") (5 THORPE, *supra*, at 3101); South Carolina Constitution of 1790, art. 9, §4 ("... nor cruel punishments inflicted") (6 THORPE, *supra*, at 3264). *Cf.* Vermont Constitution of 1777, ch. 2, §35 (6 THORPE, *supra*, at 3747): "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes ...."

[48]Ordinance of 1787, The Northwest Territorial Government, art. II (Confederation Congress, July 13, 1787): "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." *See* 1 U.S.C. xxxvii-xxxviii (1964).

[49]"Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the colonies, no year books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this important side of colonial life." MORISON (ed.), RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680 unpaginated preface (1933).

intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."[50] The writings of Blackstone, whose influence on the development of colonial American law was enormous,[51] had echoed the 1689 Parliamentary debates concerning the *Oates* case by stressing the fact that English law did not allow the arbitrary infliction of punishment:

> "it is moreover one of the glories of our English law, that the nature, though not always the quality or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment,

[50] WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 5 (1889).

[51] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 862 (1969). Edmund Burke announced to Parliament in 1775 that almost as many copies of Blackstone's *Commentaries* had been sold in the American colonies as in Great Britain. SUTHERLAND, THE LAW AT HARVARD 25 (1967).

> which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slave to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under . . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."[52]

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited English civil rights and political freedoms:[53] "from a purely legal interpretation, the American Revolution itself, as the Americans saw it, was largely the result of England's disregard of the common-law rights of the Colonists."[54] It therefore appears unlikely that they would consciously have

[52] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 371-372 (1st ed. 1769).

[53] *See* BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1-54 (1967).

[54] LEVY, ORIGINS OF THE FIFTH AMENDMENT 337 (1968).

rejected or limited any of their traditional liberties,[55] including the right against arbitrary infliction of harsh punishments. George Mason, the author of both the Virginia Declaration of Rights and the amendments proposed to Congress by the Virginia ratifying convention,[56] stressed the necessity of limiting all forms of American governmental authority by such guarantees of individual liberty:

> "In the declaration of rights which that country [Great Britain] has established, the truth is, they have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite . . . .
>
> But although . . . it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government . . . ."

1 ANNALS OF CONGRESS 436 (1st Cong., 1st Sess. 1789).

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose, of course, from various procedures[57] whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[58] But – particularly in the light of *McGautha v. California*, 402 U.S. 183 (1971) – it is impossible to read *Furman* as prohibiting only the explicit statutory annunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely *Furman* and the Eighth Amendment forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[59] whatever the source or mechanism of the arbitrariness. See *Commonwealth v. A Juvenile*, 1973

[55]The legislative history of adoption of the Eighth Amendment is sparse and not particularly illuminating as to the purposes of the Framers. *See* 2 ELLIOT'S DEBATES 111 (2d ed. 1863); 3 ELLIOT'S DEBATES 447-448, 451, 452 (2d ed. 1863); 1 ANNALS OF CONGRESS 754 (1st Cong., 1st Sess. 1789). There is evidence, however, that in certain ratifying conventions, opponents of the Constitution feared that, without a Bill of Rights, Congress would be free to devise whatever criminal punishments it wished and that tortures might be instituted. Patrick Henry, for example, declared to the Virginia Convention: "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives [in Congress] .... Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control [a constitutional prohibition on "cruel and unusual punishments"]? .... You let them loose; you do more – you depart from the genius of your country." 3 ELLIOT'S DEBATES 447-448 (2d ed. 1863). There is thus some evidence that the Framers were concerned to limit the discretion of *legislators* to devise punishments, and there is no indication whatsoever in any of the debates that they would have approved an arbitrary freedom on the part of magistrates to impose criminal punishments.

[56]*See* 1 ROWLAND, LIFE OF GEORGE MASON 234-250 (1892).

[57]For a description of some of these variations, see *State v. Rhodes*, ____ Mont. ____, 524 P.2d 1095, 1099 (1974).

[58]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[59]*Furman v. Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[60] The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[61] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with their result. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay*, 389 U.S. 128, 135-137 (1967); *Jackson v. Denno*, 378 U.S. 368, 391 n.19 (1964), It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

[60] In *Commonwalth v. A Juvenile*, the Massachusetts Supreme Judicial Court held a "mandatory" death penalty statute unconstitutional under the Eighth Amendment where death was the "mandatory" punishment for a specified crime but discretionary mechanisms existed by which a trial court could avoid subjecting a particular defendant to that "mandatory" sentence. The case involved a juvenile who had been condemned under a statute which made death the "mandatory" punishment for rape-murder. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was mandatory, see Mass. Gen. Laws Ann. c. 265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since *Furman* invalidated "*discretionary* imposition of the death sentence." 300 N.E.2d at 442 (emphasis in original).

[61] *Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

To be sure, *Waddell's* annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, trial judges, juries and the Governor in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after *Waddell*. Language requires that the several practices through which unrestrained and arbitrary discretion infects the administration of the death penalty under *Waddell* be described separately, as we shall do in the following subsections of this brief. But the practices plainly operate cumulatively to produce the kind of extreme uncertainty and unpredictability in the infliction of the death penalty that violates *Furman's* ban.

> "There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implied, that adjudication is in fact a quasi-automatic, nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification . . . ."

NEWMAN, CONVICTION: THE DETE[illegible]INATION OF GUILT OR INNOCENCE WITHOUT [illegible]IAL 150 (1966).[62] Thus as demonstrated by Professor Charles

[62] *See also* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 14-15 (1972).

Black in his recent trenchant analysis,[63] the result of

[63]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). Professor Black points out the numerous discretionary decisions made at every stage of the criminal justice process, with life and death consequences, and emphasizes:

> "Regarding *each* of these choices, through all the range, one of two things, or perhaps both, may be true.
>
> First, the choice made may be a mistaken one. The defendant may not have committed the act of which he is found guilty; the factors which ought properly to induce a prosecutor to accept a plea to a lesser offense may have been present, though he refused to do so; the defendant may have been 'insane' in the way the law requires for exculpation, though the jury found that he was not. And so on.
>
> Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only *apparent* standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.
>
> These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of *mistake* fades out as the *standard* grows more and more vague and unintelligible. There is no vagueness problem about the question 'Did Y hit Z on the head with a piece of pipe?' It is, for just that reason, easily possible to conceive of what it means to be 'mistaken' in answering this question; one is 'mistaken' if one answers it 'yes' when in fact Y did not hit Z with the pipe. It is even fairly clear what it means to be 'mistaken' in answering the question 'Did Y *intend* to kill Z?' Conscious intents are facts; the difference here really is that, for obvious reasons, *mistake is more likely* in the second case than in the first, for it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.

(continued)

numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by *Furman*: death sentences which are "wantonly and . . . freakishly imposed." *Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared.[64] It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social atti-

(footnote continued from proceeding page)

> It is very different when one comes to the question, 'Was the action of which the defendant was found guilty performed in such a manner as to evidence an 'abandoned and malignant heart'?' (This phrase figures importantly in homicide law.) This question has the same grammatical form as a clearcut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.
>
> 'Mistake' and 'arbitrariness' therefore are reciprocally related."

Id. at 19-21 (emphasis in original).

[64]*See, e.g.*, LAWES, TWENTY THOUSAND YEARS IN SING SING 302, 307-310 (1932); DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 254-255 (1962); De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n.2 (1968) (quoting Commissioner A. Frank Lee, of the Alabama Board of Corrections).

tudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates,[65] and it assuredly has not ceased in this country where "[t]hroughout our history differences in race and color have defined easily indentifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[66] "It is the poor, the illiterate, the underprivileged, the member of the minority group who is usually sacrificed by society's lack of concern."[67] To believe that this discrimination can be ended or controlled by the annulment of forthright jury discretion in capital sentencing in North Carolina blinks reality. For,

> "discretion in the imposition of the death penalty will continue to be exercised in the prosecuting attorney's decision concerning the wording of the charge; the grand jury's decision concerning the allegations of the indictment; the jury's findings concerning the existence of defenses, [and] elements of the crime . . .; and the governor's decision whether to commute the death sentence if one results. Since discretion will not be substantially restricted under the new [procedure] . . . , but merely shifted to other parts of the criminal justice process, there is little reason to expect that disproportionate application to minorities and poor people will not continue."[68]

[65]PIERREPOINT, EXECUTIONER: PIERREPOINT 211 (1974):

> "As long as reprieves for the death sentence existed, the reason for a reprieve was always fundamentally political: an execution here would incite too much sympathy for the victim and must be respited; an execution there will show that the Home Secretary means business. The public were allowed to blow like the wind for one popular reprieve of a favourite from Hampstead, and stay dead calm about an unattractive strangling in Ashton-under-Lyne precisely because the same basic inconsistency was being operated for the policy reprieves. The trouble with the death sentence has always been that nobody wanted it for everybody, but everybody differed about who should get off."

[66]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

[67]DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). *See also* text and notes at notes 226-227, *infra*.

A. Prosecutorial Charging Discretion

As long ago as 1931, the Wickersham Commission reported that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom. . . ."[69]

[68]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974). *See also* Note, *Mandatory Death: State v. Waddell*, 4 N.C. CENT. L. J. 292, 298 (1974).

[69]NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). *See also* DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1971); authorities collected in note 74 *infra*. *Cf.* MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929):

> ". . . I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts, partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no reasons for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent, he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one."

In North Carolina, the prosecuting attorney (called the Solicitor) is charged with the duty to "prepare the trial dockets, [and] prosecute in the name of the State *all criminal actions requiring prosecution* in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1973 cum. supp.) (emphasis added). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions,[70] *State*

[70]A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under *Waddell*. In *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974), two persons were tried and convicted for murder during the course of an armed robbery. A third person, one Brailford, had helped to plan the robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." 204 S.E.2d at 647. The Court described Brailford's criminal role in the following fashion:

> "the State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated he expected his cut. . . .
>
> The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Ibid. The other two persons involved in the robbery, Spicer and one Isaac Monk, were convicted of first degree murder and sentenced to die. Spicer's conviction has been, as indicated, reversed on grounds permitting a retrial and a new death sentence, while Monk's conviction and death sentence are now pending on appeal in the North Carolina Supreme Court. *State v. Monk*, No. 13, New Hanover County, Fall Term, 1974.

v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953),[71] including not only absolute discretion whether and what to charge,[72] but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment even if the evidence

[71]The Court also ruled in *State v. Loesch*, that the Attorney General had no supervisory jurisdiction over the several Solicitors of the State, whose offices were established by Article III, Section 18 of the State Constitution. "[T]he duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties." 75 S.E.2d at 656.

[72]The grand jury provides no significant check upon prosecutorial discretion since – except in a few extraordinary cases – it is heavily dominated by the prosecuting attorney. *See, e.g.*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1171 (1960), and authorities cited; Shannon, *The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor*? 2 NEW MEXICO L. REV. 141, 170 (1972); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 212-213 (1955). Indeed, it is dubious that even the most conscientious grand juror, zealous to perform the grand jury's function of providing " 'a fair method for instituting criminal proceedings against persons believed to have committed crimes,' " *Costello v. United States*, 350 U.S. 359, 362 (1956) (as quoted in *Russell v. United States*, 369 U.S. 749, 761 (1962)); *accord: State v. Greer*, 238 N.C. 325, 77 S.E.2d 917, 918-919 (1953), by inquiring "into the existence of possible criminal conduct and [returning] . . . only well-founded indictments," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *see also United States v. Calandra*, 414 U.S. 338, 343 (1974), would suppose that this function called upon him to return an indictment upon charges *greater* than those sought by the prosecutor. And, as we shall shortly see under North Carolina law, if a grand jury did return such an indictment, the prosecutor could elect not to prosecute the offense charged, but only a lesser included offense. *See* text and note at note 73 *infra*.

shows that a greater crime has been committed, *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 455 (1971);[73] *and see State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951).[74]

[73] In *State v. Allen*, the Court affirmed a second degree burglary conviction in a case where the sole question presented on appeal was " 'Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?' " 181 S.E.2d at 455. The appellant was charged by indictment with first degree burglary, but at trial the solicitor announced he would seek no verdict greater than burglary in the second degree. The Supreme Court of North Carolina ruled that "the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein.... The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses." *Ibid.*

[74] *Cf.* Note, *Prosecutorial Discretion*, 21 DePAUL L. REV. 485, 486 (1971-1972):

> "[t]he limitations of a prosecutor's discretion are somewhat nebulous, and, in general, undefined. He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."

See also MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-172, 293-350 (1969); 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 315-320 (1956); Baker & DeLong, *The Prosecuting Attorney*, 24 J. CRIM. L. & CRIM. 1025 (1934); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957); Mills, *The Prosecutor: Charging and "Bargaining."* 1966 U. ILL. L. F. 511; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted*

The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is *State v. Casey*, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The North Carolina Supreme Court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And following *Waddell*, the court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that the Eighth and the Fourteenth Amendments required any circumscription of the discretion of the Solicitor in capital cases:

> "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

The consequence of this unfettered prosecutorial discretion is, of course, that different Solicitors may utilize different standards in deciding whether to initiate capital or noncapital prosecutions. Without any guidance whatsoever,[75] a Solicitor is free to make the

[75] *Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952):

> "[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves."

decision whether an indictment will be sought for first or second degree murder or manslaughter,[76] for rape or assault with intent to rape, for first or second degree burglary. He may thus "without violating [his] . . . trust or any statutory policy . . . refuse to [seek] . . . the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White). This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions[77] of first degree burglary during a full year of *Waddell's* implementation in a State where there were about forty convictions annually for this crime in

[76] As we demonstrate at pp. 65-76 *infra*, the distinctions among these offenses as they may apply to particular factual situations are largely intangible and judgmental.

[77] *State v. Poole, rev'd for insufficient evidence*, 285 N.C. 108, 203 S.E.2d 786 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d10(1974), *petition for cert. filed sub nom. Henderson v. North Carolina*, U.S.S.C. No. 73-6853 (June 8, 1974); *State v. Boyd*, N.C. Sup. Ct. No. 7, Spring Term 1974, (pending on appeal). In *State v. Henderson, supra*, the defendant was also convicted of and sentenced to die for rape; and in *State v. Boyd, supra*, the jury was unable to agree on a homicide verdict after it was instructed that it could find the defendant guilty of second degree murder.

the recent past,[78] and where 39,210 "burglaries and housebreakings" were reported in 1972.[79] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary

[78] In 1955, the North Carolina Department of Justice ceased to report separate statistics for persons convicted of first degree burglary and of second degree burglary. In 1952, there were 47 convictions for first degree burglary in Superior Court (with 15 "Other dispositions") and 5 convictions in "inferior court" (with 64 "Other dispositions" there). 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 515, 521 (1954). In 1953, there were 33 convictions for first degree burglary in Superior Court (with 10 "Other dispositions") and 4 convictions in "inferior court" (with 49 "Other dispositions" there). *Ibid.* In 1954, there were 35 convictions for first degree burglary in Superior Court (with 26 "Other dispositions") and 9 convictions in "inferior court" (with 61 "Other dispositions" there). 33 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1954-1956 377, 379 (1956). "Other dispositions" is nowhere defined; since the total of convictions and "Other dispositions" represents "cases disposed of in the Superior and inferior courts of the State," 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 510 (1954), "Other dispositions" apparently includes acquittals and *no! pros's*.

[79] UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972 74 (Aug. 1973). The Uniform Crime Reports, of course, reflect reported crimes, not convictions; and the reported "burglaries and housebreakings" doubtless exceed the total number of statutory first degree burglaries which occurred in the State during 1972. Nevertheless, it cannot rationally be imagined that only *three* first degree burglars were apprehended in North Carolina during a twelve month period.

prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the *Waddell* regime is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: "[a] charge may be reduced to avoid infliction of punishment harm that administrative officials regard as too severe in relation to the suspect's conduct. Usually, a less serious offense is charged because conviction of the maximum offense carries a statutory mandatory minimum sentence."[80]

As with the death-penalty statutes struck down in *Furman*, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," *Yick Wo*

[80] MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). *Cf.* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 49 (1972):

> "[o]fficials tend to respond to the undue harshness of punishments provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process become exaggerated."

v. Hopkins, 118 U.S. 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably *arbitrary*. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like petitioner, will not be capitally charged while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge is quite literally the difference between life and death, that choice is a completely uncontrolled, discretionary decision of the Solicitor.

B. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in North Carolina under the *Waddell* procedures is the unfettered power of the Solicitor to accept a plea of guilty to a lesser or other non-capital offense from a capitally charged defendant, and/or to *nol pros* a capital indictment. Exercise of this discretionary power undercuts the "mandatory" nature of the death penalty for first degree murder as effectively as the practice of selectively charging homicide defendants with second degree murder or manslaughter at the outset. The guilty-plea process is unregulated by law, and the discretion of a Solicitor to accept a plea to a lesser offense in a capital case is therefore quite as untrammelled as the freedom of a jury to recommend mercy in a pre-*Waddell* capital prosecution.

Plea bargaining is pervasive in the criminal justice system; guilty pleas are said to account for up to ninety per cent of all criminal convictions.[81] Indeed, in view of the judicial resources available, the systematic and extensive practice of plea bargaining appears inevitable:

> "[i]f all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). *See also* Coon, *The Indictment Process and Reduced Charges*, 40 N.Y. ST. BAR J. 434 (1968). A study of the indictments for first and second degree murder in Massachusetts between 1956 and 1965 which received a final disposition in terms of guilt or innocence revealed that 221 out of 326 defendants (67.8%) entered a guilty plea and that 93.2% of these guilty pleas were to a lesser charge. Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFF. L. REV. 292, 299 (1969). The study concluded that:

> "there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death.... Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court."

Id. at 307.

> could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him.... The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty."[82]

Because homicide cases are likely to take up a great deal of time in preparation and trial, they are particularly likely to be settled by plea bargaining.[83] And the fact that the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error provides an additional incentive for plea bargaining in capital cases:

> " '[s]ince time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an Appellate Court.' "[84]

[82] LUMMUS, THE TRIAL JUDGE 46 (1937).

[83] In the words of one prosecutor:

> " 'A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial.' "

Pittsburgh First Assistant District Attorney James G. Dunn, quoted in Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

[84] Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, *State v. Faison*, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

Plea bargaining almost inevitably involves a reduction in charge or sentence: "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process."[85] This Court is not unfamiliar with guilty pleas to lesser included offenses entered by North Carolina defendants charged with capital crimes, who thereby escaped possible death penalties. *North Carolina v. Alford*, 400 U.S. 25 (1970);[86] *Parker v. North Carolina*, 397 U.S. 790 (1970). Such cases are a commonplace of "capital" justice. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973). Indeed, the prosecutor's attitude toward plea-bargaining in the case of a death-charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[87] That attitude in turn reflects fundamentally the prosecutor's choice to insist upon or to remit the punishment of death. For his willingness to offer or accept a lesser plea (and how much lesser) responds not

[85]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

[86]In *North Carolina v. Alford*, the Court noted that "the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired." 400 U.S. at 37.

[87]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

merely to his estimate of trial costs and contingencies but also to his wholly discretionary judgment – sometimes reasoned, sometimes "gut," sometimes principled and independent, sometimes politically opportunistic, but always selective and subject to the influence of factors which remain "demeaningly trivial compared to the stakes"[88] – as to whether the particular offense or offender *deserves* capital punishment.[89]

Furthermore, an ostensibly "mandatory" death penalty statute is especially likely to result in the selective allowance of guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences."[90] The negotiated

[88]This phrase was used by the late Professor Harry Kalven, Jr., and by Hans Zeisel to describe the factors affecting capital sentencing by juries before *Furman*. KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966). It is equally apt to describe the factors influencing the prosecutor's plea-bargaining discretion after *Furman* and *Waddell*.

[89]*See* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 41-44 (1974). *Cf.* note 91 *infra*.

[90]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 102 (1966). *Cf.* Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW No. 5, 31-32 (1961):

> "[t]hese plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently too tough . . . . The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations."

plea is "the means by which . . . [a prosecutor] can avoid the unacceptably rigorous application of the letter of the law."[91] Prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes."[92]

It is clear that a great many capitally charged defendants in North Carolina have been allowed to plead guilty to lesser offenses and thus to escape the threat of a death penalty.[93] In other cases, however,

[91] Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 25 (1972). *See also* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case – A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. No. 7, 44, 53 (1961):

> "[i]n many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[92] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966). *See also* 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 319 (1956); Coon, *The Indictment Process and Reduced Charges*, N.Y. ST. BAR J. 434, 438 (1968).

[93] *See, e.g.*, the following 17 cases: *State v. Hamlin*, Wake County Super. Ct. No. 74-Cr-11895 (April 1, 1974, indictment for first degree murder; April 12, 1974, guilty plea to second degree murder, sentence of 15-20 years); *State v. Leroy Johnson*, Wake County Super. Ct. No. 74-Cr-7160 (February 25, 1974, indictment for first degree murder; March 8, 1974, guilty plea to second degree murder, sentence of 10 years); *State v. Harris*, Wake County Super. Ct. No. 73-Cr-76418 (February 11, 1974,

(continued)

solicitors have wanted and achieved nothing less than a

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indictment for rape; August 19, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Santor*, Wake County Super. Ct. No. 73-Cr-68725 (February 11, 1974, indictment for first degree murder; July 15, 1974, guilty plea to voluntary manslaughter, sentence of 20 years); *State v. Lacy Jones*, Wake County Super. Ct. No. 73-Cr-698 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Kenneth Jones*, Wake County Super. Ct. No. 74-Cr-697 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault with intent to inflict serious injury, sentence of 1 year); *State v. Chance*, Wake County Super. Ct. No. 74-Cr-696 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Goldston*, Wake County Super. Ct. No. 73-Cr-73020 (January 7, 1974, indictment for first degree murder; May 24, 1974, guilty plea to voluntary manslaughter, sentence of 7 to 10 years); *State v. Smith*, Wake County Super. Ct. No. 73-Cr-54092 (October 29, 1973, indictment for first degree burglary; February 25, 1974, guilty plea to breaking and entering with intent to commit larceny, sentence of 7-10 years suspended with probation); *State v. Otha Johnson*, Wake County Super. Ct. No. 73-Cr-44188 (August 30, 1973, indictment for first degree murder; April 22, 1974, guilty plea to voluntary manslaughter, sentence of 14-18 years); *State v. Wright*, Wake County Super. Ct. No. 73-Cr-41760 (August 30, 1973, indictment for rape; November 7, 1974, guilty plea to assault on a female, sentence of time served); *State v. Weatherspoon*, Wake County Super. Ct. No. 73-Cr-38571 (August 30, 1973, indictment for first degree burglary; October 12, 1973, guilty plea to felonious breaking and entering, sentence of 1-2 years); *State v. Ramos*, Wake County Super. Ct. No. 73-Cr-30623 (May 29, 1973, indictment for first degree burglary; June 4, 1973, guilty plea to non-felonious breaking and entering, sentence of 2 years suspended with 5 years probation); *State v. DeBoise*, Wake

(continued)

capital conviction and sentence.

Plea bargaining under a "mandatory" statute is frequently said to "provide the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[94] The result of this process, however, is thoroughly to vitiate the uniform operation of the statute:

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County Super. Ct. No. 73-Cr-29233 (May 29, 1973, indictment for first degree burglary; October 22, 1973, guilty plea to felonious breaking and entering, sentence of 4 years suspended with probation); *State v. Stephenson*, Wake County Super. Ct. No. 73-Cr-27254 (May 29, 1973, indictment for rape; April 29, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. Ct. No 73-Cr-20787 (April 24, 1973, indictment for rape; April 18, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. St. No. 73-Cr-15922 (April 9, 1973, indictment for first degree murder; November 26, 1973, guilty plea to voluntary manslaughter, sentence of 20 years). These cases, terminated by a guilty plea to a non-capital offense, were initiated by capital indictments returned in one of North Carolina's one hundred counties (Wake), the county in which petitioner was indicted, for offenses allegedly committed during the January 18, 1973 – April 8, 1974 period when the capital procedures mandated by *State v. Waddell* were in effect.

[94]Heath, *Plea Bargaining – Justice Off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 98 (1966):

> "[c]harge reduction offers the court an opportunity to individualize justice by distinguishing between technically similar cases in both sentence and conviction label, especially when sentencing discretion is denied by legislatively fixed terms."

> "[i]n both Michigan and Kansas, where mandatory sentences for particular crimes are common, plea negotiation not only is a widespread practice considered necessary to obtain guilty pleas but is generally accepted by both prosecution and the trial courts as desirable in situations where charge reduction is necessary to avoid overly severe sentences."[95]

Such a practice – by which some defendants indicted for capital offenses are permitted to escape with sentences less harsh than death as the result of plea negotiations conducted in the unlimited discretion of the prosecutor – may be thought necessary and proper, and it is doubtless inevitable, to achieve "individualized" and "humane" justice under the exceedingly broad range of death penalties made "mandatory" in North Carolina by *Waddell*. But in the very process of "ameliorating the severity of the more extreme punishment," *United States v. Jackson*, 390 U.S. 570, 582 (1968), it reintroduces exactly the kind of arbitrary selectivity condemned in *Furman*.[96]

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[95]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 41 (1966).

> "A major characteristic of criminal justice administration particularly in jurisdictions characterized by legislatively fixed sentences, is charge reduction to elicit a plea of guilty."

Id. at 76.

[96]Although properly supervised plea bargaining may not violate Due Process, *see Brady v. United States*, 397 U.S. 742, 750-755 (1970), the result of plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under *Furman v. Georgia*. This is so for the same reason that the approval of standardless jury sentencing under the Due Process Clause in *McGautha v. California*, 402 U.S. 183 (1971), did not imply (as the subsequent *Furman* decision made clear) that the *results* of such a procedure complied with the Eighth Amendment.

C. Jury Discretion

Despite the annulment of explicit sentencing discretion following a first degree murder conviction, a North Carolina jury still has broad license to spare the life of a capital defendant. It may do so by convicting him of a lesser homicide offense, an attempt or an assault, or by recognizing some amorphously defined defense as a justification or mitigation of the offense, as well as by acquitting him altogether in the teeth of the evidence. Although this jury discretion is less straightforward than under North Carolina's pre-*Waddell* capital procedure, it is equally selective, and its greater diffusion merely injects greater arbitrariness into the disposition of capital offenders at the trial stage.

North Carolina General Statutes § 15-170 (repl. vol. 1969) provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ."

Petitioner's jury was charged on manslaughter, second degree murder, and first degree murder (A. 69-84), thereby giving it a *de facto* sentencing power to impose any punishment from a term of four months imprisonment (N.C. Gen. Stat. § 14-18 (repl. vol. 1969)) to a "mandatory" death penalty (N.C. Gen. Stat. § 14-17 (repl. vol. 1969)). The instructions given to this jury are representative of those utilized in most cases where a defendant is charged with "premeditated and deliberated" first degree murder; and a charge on lesser included offenses is not infrequently given even in cases of first degree murder allegedly committed during a felony, *see State v. Knight*, 248 N.C. 384, 103 S.E.2d

452 (1958), or by poisoning, *see State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). For not only is it the rule that a defendant may demand a lesser-included-offense instruction as a matter of right whenever *any* evidence could conceivably support a lesser conviction,[97] but – as we shall see below[98] – no effective restraint is imposed upon the trial judge's submission of lessers to the jury in the absence of any such evidence.

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[97]"If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958) (quoting *State v. Spivey*, 151 N.C. 676, 65 S.E. 995, 999 (1909)); *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42, 44 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149, 151 (1971); *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 397 (1971); *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289, 294 (1971); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); *State v. Cox*, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime, *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916, 921 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494, 496 (1945); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, 467-468 (1934); *State v. Charles*, 80 N.C. 353, 357-358 (1879). However, if a lesser-included offense charge is given in such a situation, and if a defendant is convicted of the lesser without evidentiary support, the conviction will nevertheless be affirmed on appeal. *See State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), discussed in text at p. 78 *infra*.

[98]*See* text and notes at notes 117-119 *infra*.

The Supreme Court of North Carolina has frequently reversed convictions for capital first degree murder[99] because the trial court failed to give a charge on second degree murder,[100] voluntary manslaughter,[101] or involuntary manslaughter.[102] Indeed, the right to a lesser-included-offense charge is considered so important in

[99]The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

[100]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958); *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946); *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). When the State attempts to prove "willful, deliberate and premeditated killing," N.C. Gen. Stat. §14-17 (repl. vol. 1969), which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. §15-172 (repl. vol. 1969), and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965). *Cf. State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341-343 (1965); *State v. Drake*, 8 N.C. App. 214, 174 S.E.2d 132, 135 (1970).

[101]*State v. Manning*, 251 N.C. 1, 110 S.E.2d 474 (1959); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

[102]*State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Cf. State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

North Carolina that its omission is held to be reversible error even when the defendant fails to request it. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E.2d 83 (1959). *See State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). Trial judges are therefore advised to err on the side of inclusion; and, once lesser-offense instructions on second degree murder and manslaughter are included in a first degree murder trial, the jury is given essentially unrestricted discretion to convict alternatively for any of the three crimes. The definitions of the respective offenses under North Carolina law do not distinguish them except in terms of vague, intangible and elusive elements that remain as intractable to objective fact-finding as they are inviting to "any amount of purely 'discretionary' decision."[103]

North Carolina General Statutes § 14-17 (repl. vol. 1969) defines as murder in the first degree any

> "murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony."

It then declares second degree murder to be "[a]ll

[103]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974).

other kinds of murder."[104] Thus, in a case like petitioner's, "[m]urder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 657 (1969). *See also State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 771-773 (1961); *State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 892 (1963). *See also State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 337 (1969); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942).[105] Manslaughter is not defined by statute[106] but has been declared judicially to be "the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Kea*, 256 N.C.

[104]The crime of murder was divided into two degrees in 1893. *See* N.C. Acts 1893, ch. 85. Since this date, the common law definition of murder as an unlawful and malicious killing has been applicable only to second degree murder; and to constitute statutory first degree murder, "the killing must be 'wilful, deliberate, and premeditated.'" *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128, 129 (1899). Before 1893, "[a]ny unlawful killing of a human being with malice aforethought, express or implied, was murder and was punishable by death." *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 803 (1970).

[105]"Murder in the first degree is sometimes defined as murder in the second degree plus premeditation," *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 804 (1970).

[106]North Carolina General Statutes §14-18 (repl. vol. 1969) merely provides that the punishment for "manslaughter" shall be imprisonment "for not less than four months nor more than twenty years."

492, 124 S.E.2d 174, 175 (1962). *See also State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910).

The constituent elements that mark the lines between first and second degree murder and manslaughter are extraordinarily hazy and amorphous. "The crime of murder in the first degree is distinguished by a mental process or psychological condition none [too] . . . easy of expression." *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942). Indeed, the North Carolina Supreme Court has declared that the reason for the statutory division of murder into two degrees in 1893 was to "select . . . out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration." *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649, 652 (1949). *See also State v. Cole*, 132 N.C. 1069, 44 S.E. 391, 393 (1903).

> "The passage of the Act of 1893 marks an era in the judicial history of the state. As far as we can ascertain, every other state had previously divided the common-law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder, this new law will fail to accomplish the object for which it was framed . . . . It is not the severity of

laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved, and often applauded, the conduct of juries in disregarding the instructions of judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that, a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offense. The experience of a few years will probably demonstrate here, as elsewhere, that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offenses differing widely in the degree of moral turpitude exhibited."

State v. Fuller, 114 N.C. 885, 19 S.E. 797, 802 (1894).[107]

[107]*Cf. State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896) (emphasis in original):

"the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled, arbitrary, or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But is is expected they will find the facts, and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before."

First degree murder is defined broadly, though vaguely:

"'[m]alice aforethought' was a term used in defining murder prior to the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade .... As used in ... G.S. § 14-17, the term 'premeditation and deliberation' is more comprehensive and embraces all that is meant by 'aforethought', and more."

State v. Hightower, 226 N.C. 62, 36 S.E.2d 649, 650 (1946).[108] The difference between first and second degree murder turns on the presence or absence of "premeditation" and "deliberation":

"[p]remeditation means 'thought beforehand for some length of time, however short.'

....

'Deliberation means that the act is done in [a] cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill,[109] executed by the defendant in a cool state of blood, in

[108]*See also State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942):

"[a]s pointed out by the Attorney General, 'a... thought is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate." '"

[109]The intention to kill which is required for first degree murder, *see, e.g., State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858, 861 (1969); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 567 (1908), is sometimes said to be merely an element of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567 (1968); *cf. State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322, 324 (1955).

furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' "

State v. Reams, 277 N.C. 391, 178 S.E.2d 65, 71 (1970) (quoting *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922)). *See also State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674, 683 (1972); *State v. Benson*, *supra*. " 'No fixed length of time is required for the mental processes of premeditation and deliberation . . . and it is sufficient if these processes occur prior to, and not simultaneously with, the killing,' " *State v. Perry*, 276 N.C. 339, 172 S.E.2d 541, 547 (1970) (quoting 4 STRONG, NORTH CAROLINA INDEX 196 (2d ed. 1958)). The determination whether "premeditation" and "deliberation" exist is necessarily given over almost entirely to the intuition of the jury[110] because these elements "are not usually susceptible of direct proof, and are therefore susceptible of proof by

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"The line which separates felonious homicides committed . . . without premeditation, from those accompanied by the additional mental condition called 'premeditation,' is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury."

State v. Daniels, 134 N.C. 671, 46 S.E. 991, 993 (1904). *See also* note 111 *infra*.

circumstances from which the facts sought to be proved may be inferred." *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484, 490 (1969).

"Malice," the factor that separates murder from manslaughter, is equally a matter of inference – and often of inference (or presumption) from the same basic facts that might support the jury's inference of premeditation and deliberation.[111]

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[111] *See, e.g., State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398-399 (1971) (alternative ground), and cases cited.

For example, the North Carolina cases say that malice is "implied" (*see State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922), quoted in text pp. 72-74 *infra; and see, e.g., State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 421 (1910); *State v. McDowell*, 145 N.C. 563, 59 S.E. 690, 692 (1907)) or "presumed" (*see State v. Sparks*, ——— N.C. ———, 207 S.E.2d 712, 719 (1974); *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341 (1965)) whenever the defendant's intentional discharge of a deadly weapon results in death. This principle plainly involves an evidentiary presumption that throws upon the defendant the burden of proving (either through the presentation of evidence or through the appearance of mitigating circumstances in the State's case, *e.g., State v. Vann*, 162 N.C. 534, 77 S.E. 295, 298 (1913)) that a killing with a firearm was non-malicious. *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943), and cases cited. Whether it also means that the prosecution is always entitled to a second degree murder submission in a case where the defendant is armed with a firearm is unclear. *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39, 43 (1960), implies this conclusion, although earlier cases suggest the contrary. *See State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910); *State v. Miller*, 112 N.C. 878, 17 S.E. 167, 168-169 (1893).

(continued)

"Malice is not only hatred, ill will or spite, as it is

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Since *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894), the North Carolina Supreme Court has consistently iterated the rule that premeditation and deliberation – unlike malice– are *not* "presumed" from an intentional discharge of a deadly weapon resulting in death. *E.g., State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). As expressed in *Fuller*, this doctrine seemed to forbid a permissive inference, as well as a presumption, of premeditation and deliberation. However, later expressions of the *Fuller* rule speak only of the impropriety of a "presumption," *see e.g., State v. Reams, supra*, 178 S.E.2d at 71; *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 772 (1961); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188, 190 (1950); *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 33 (1938); *State v. Miller*, 197 N.C. 445, 149 S.E. 590, 592 (1929); *cf. State v. Booker*, 123 N.C. 713, 31 S.E. 376, 380 (1898), and of the shift of the burden of proof which a true presumption implies, *cf. State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566-568 (1968). Collateral doctrinal developments have undercut the notion that an *inference* of premeditation and deliberation may not be drawn from intentional use of a deadly weapon: "[p]remeditation and deliberation are not usually susceptible to direct proof but must be established from the circumstances surrounding the homicide." *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487, 499 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *see also State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974); *State v. Evans*, 198 N.C. 82, 150 S.E. 678, 679-680 (1929); *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, 160 (1973). The jury is to determine premeditation and deliberation from " 'all the attendant circumstances' " under which the homicide is committed, *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 34 (1938), including "the manner of the killing, [the defendant's] ... acts and conduct attending its commission," *State v. Robertson*, 166 N.C. 356, 81 S.E. 689, 692 (1914); any "vicious and brutal circumstances," *State v. Duboise*, 279 N.C. 73, 181

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ordinarily understood – to be sure that is malice

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S.E.2d 393, 399 (1971); and the "use of grossly excessive force," *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974) (quoting *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539, 545 (1973)) "[P]remeditation and deliberation may be inferred from a vicious and brutal slaying of a human being." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). Thus, it is no surprise that the North Carolina Supreme Court has abandoned its early occasional practice of reversing first degree murder convictions (*see State v. Cole*, 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902) (alternative ground); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Thomas* 118 N.C. 1113, 24 S.E. 431 (1896) (alternative ground)) for insufficiency of evidence of premeditation and deliberation. Not since 1903 has a North Carolina appellate court held evidence insufficient to permit a finding of premeditation and deliberation, and therefore to support a first degree murder conviction – even though reversals for insufficient evidence of matters such as identity are common, *e.g., State v. Poole*, 285 N.W. 108, 203 S.E.2d 786 (1974) (capital burglary); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (second degree murder). Numerous cases sustain first degree murder verdicts where virtually nothing more than an unprovoked killing with a deadly weapon was established by the prosecution. *See, e.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Matheson*, 225 N.C. 109, 33 S.E.2d 590 (1945); *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439 (1939); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1917); *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

The upshot, then, is that, in all but perhaps the rarest case of a killing by a defendant armed with a deadly weapon, no judicial control is exercised over the power of the jury to convict of any offense from manslaughter through first degree murder. The jury may or may not infer premeditation and deliberation from the same evidence which gives rise to the presumption of malice; and it may or may not find that presumption overcome to its "satisfaction" (*see* pp. 82-83 *infra*) by evidence of mitigation.

> – but it also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification . . . . It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon. . . ."

State v. Benson, 183 N.C. 795, 111 S.E. 869, 871 (1922).[112] *See also State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 893 (1963); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910); *State v. Tilley*, 18 N.C. App. 300, 196 S.E.2d 816, 818 (1973).

[112]Proof of a fight between the decedent and the defendant or threats uttered by the decedent to the defendant is often sufficient to negate the inference of malice. *See, e.g.*, the following cases in which defendant was convicted of manslaughter: *State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 70-72 (1967); *State v. Camp*, 266 N.C. 626, 146 S.E.2d 643, 644-645 (1966); *State v. Suddreth*, 230 N.C. 239, 52 S.E.2d 924, 925 (1949); *State v. Church*, 229 N.C. 718, 51 S.E.2d 345, 346 (1949); *State v. Beachum*, 220 N.C. 531, 17 S.E.2d 674, 675 (1941); *State v. Bright*, 215 N.C. 537, 2 S.E.2d 541, 542 (1939); *State v. Reynolds*, 212 N.C. 37, 192 S.E. 871, 871 (1937); *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837, 838 (1922); *State v. Yates*, 155 N.C. 450, 71 S.E. 317, 317-318 (1911). However, a verdict of second degree murder is often affirmed in cases arising out of similar factual circumstances. *See, e.g.*, the following cases in which defendant was convicted of second degree murder; *State v. Cole*, 280 N.C. 398, 185 S.E.2d 833, 833-834 (1972); *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89, 89-90 (1967); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104, 105-107 (1967); *State v. Morgan*, 245 N.C. 215, 95 S.E.2d 507, 507-508 (1956); *State v. Wingler*, 238 N.C. 485, 78 S.E.2d 303, 305-306 (1953); *State v. Russell*, 233 N.C. 487, 64 S.E.2d 579, 580 (1951); *State v. Taylor*, 226 N.C. 286, 37 S.E.2d 901, 901-902 (1946); *State v. Brinkley*, 183 N.C. 720, 110 S.E. 783, 785-786 (1922); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706, 706-707 (1899); *State v. Rummage*, 19 N.C. App. 239, 193 S.E.2d 475 (1972).

Definitions of this kind allow a jury almost complete freedom to return a capital or non-capital verdict not only upon the same evidence but upon the same factual interpretation of the evidence, finding or declining to find "premeditation," "deliberation" or "malice" in accordance with the desired sentencing consequences. To recognize this obvious truth is not to impugn the fidelity of jurors to their oaths but only to acknowledge that they are human. *See Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). Legal formulations spelling the difference between life and death in terms that are "refractory to the best-instructed human understanding"[113] do not merely permit – they imperatively require – the exercise of non-objective, non-factual, discretionary judgments and "the play of . . . prejudices."[114] "[I]n a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter."[115] Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and non-capital grades of homicide – in particular, the concept of premeditation and deliber-

[113]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299 (1971).

[114]*Furman v. Georgia*, *supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas).

[115]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

ation – amounted largely to an indirect "dispensing power" of mercy:

> "... the distinction [between first and second degree murder] is much too vague to be continued in our law .... [t]he statute is framed along the lines of a defective and unreal psychology.... What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[116]

[116]CARDOZO, LAW AND LITERATURE 99-101 (1931). To speak of a "dispensing power," of course, is to describe only the benign half of what juries do when they "answer 'yes' or 'no' to the question whether this defendant was fit to live," *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). A "yes" answer, "like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* find him guilty of a lesser offense rather than of the capital charge. And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its *lack* of sympathy." BLACK, CAPITAL PUNISHMENT, THE INEVITA-

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We have already seen that the "privilege" described by Justice Cardozo "to find the lesser degree" must be afforded to the jury under North Carolina law when there is "any evidence, or ... any inference ... therefrom"[117] of an unpremeditated or a non-malicious killing, within the vague contours of those unilluminating terms. But even that is not the whole story of the trial judge's or the jury's discretion in regard to lessers. For in North Carolina, a jury may also be charged on a lesser included offense where there is *no* evidence to

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BILITY OF CAPRICE AND MISTAKE 47 (1974) (emphasis in original).

Although it seems superfluous to make this point after *Furman*, we may note that the oft-quoted passage in *Witherspoon v. Illinois, supra*, regarding the jury's function in maintaining "a link between contemporary community values and the penal system," 391 U.S. at 519 n.15, did not state or imply the propriety of a system under which different juries decided whether different defendants were fit to live or die according to the particular reflection of community values fortuitously mirrored by the particular jury. The *Witherspoon* passage rather carefully states that, *where a legislature has left the life-or-death sentencing choice to be made by juries without any guiding principles, preferences or standards*, the juries' function is to reflect community attitudes regarding the death penalty – with the consequence that the reflection may not be distorted by improper jury-selection practices. The "where" clause in this analysis is a description of Illinois law (not challenged in *Witherspoon*): it is not a prescription for desirable or constitutional jury performance.

[117]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958), quoted more fully in note 97 *supra*.

support such a charge, and a conviction for the lesser offense will be sustained on appeal.[118] *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917). In *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder,

[118] The Supreme Court of North Carolina has occasionally disapproved of this practice, *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

> what right has the defendant to complain? It is an error prejudicial to the state, and not to him."[119]

In *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

The jury has the further statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime. North Carolina General Statutes § 15-170 (repl. vol. 1969) provides:

[119] "An error on the side of mercy is not reversible . . . " *State v. Fowler*, 151 N.C. 731, 66 S.E. 567, 567 (1909). *Accord: State v. Rowe*, 155 N.C. 436, 71 S.E. 332, 337 (1911). *See also State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 466 (1969); *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); *State v. Hall*, 214 N.C. 639, 200 S.E. 375, 377 (1939); *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605, 606 (1930).

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

And N.C. Gen. Stat. § 15-169 (repl. vol. 1969) provides that:

> "[o]n the trial of any person for . . . any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

Failure of the trial court to instruct the jury on attempt or assault may be reversible error. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923).[120]

Additional avenues for avoidance of a "mandatory" death penalty for first degree murder are provided by the power of North Carolina juries to allow a variety of indefinitely defined defenses, justifications and mitigations to the capital charge. These include the complete defenses of self-defense (or defense of others), *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 829 (1938), and insanity, *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969); provocation and passion, *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916); *State v. Johnson*, 23 N.C. 354, 359, 362 (1840); and "imperfect" self-defense, *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836 (1922), which serve to reduce murder to manslaughter – doctrines of particular significance because "every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter," *State v. Brittain*, 89 N.C. 481, 501 (1883); and intoxication, which may avert at least a conviction of murder in the first degree, *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439, 446-447 (1939). Each of these doctrines involves an "affirmative" defense which the jury may or may not choose to accept upon the evidence urged by the defendant to support it; each requires largely subjective judgments by jurors in the application of principles of the greatest vagueness and imprecision;[121] and the

[120] *See also State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 53-54 (1957); *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951); *State v. Webb*, 20 N.C. App. 199, 200 S.E.2d 840, 841 (1973). *Cf. State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (dissenting opinion of Mr. Chief Justice Bobbitt). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." *State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

[121] The contours of each North Carolina doctrine mentioned above are described in the following paragraphs, with the exception of insanity. Concerning the implications of the insanity defense as a means of avoiding capital punishment, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50-55 (1974). North Carolina employs the traditional M'Naghten test of legal insanity, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, 518-519 (1973), whose amorphousness is notorious, *see, e.g.*, GOLDSTEIN, THE INSANITY DEFENSE 44-66 (1967). And two ancillary North Carolina doctrines effectively consign the insanity defense to the complete discretion of the jury. First, the quantum of evidence suggesting mental abnormality which is ordinarily necessary to raise the issue for the jury's consideration is extremely small, *cf. State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 237 (1943), except, perhaps, where the nature of the testimony is not directed to the M'Naghten issue, *see State v. Helms*, 284 N.C. 508, 201 S.E.2d 850, 852-853 (1974). Second, the burden of proof upon the issue is the "satisfaction of the jury" test (*see* pp. 82-83 *infra*), and "[t]he jury alone is the judge of its satisfaction." *State v. Harris, supra*, 28 S.E.2d at 237-238.

peculiar North Carolina burden of proof on these issues – evidence "sufficient to satisfy" the jury – explicitly invites the making of those judgments in a wholly discretionary, non-objective manner.

> "[The North Carolina] cases enunciate and reiterate the rule – established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868) – that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied."

State v. Freeman, 275 N.C. 662, 170 S.E.2d 461, 464 (1969) (emphasis in original).[122] "[T]he intensity of the

[122] *See also State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235, 242 (1972); *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 428 (1971); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 333 (1969); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943); *State v. Meares*, 222 N.C. 436, 23 S.E.2d 311, 312 (1942); *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *State v. Carland*, 90 N.C. 668, 674-675 (1884); *State v. Calloway*, 1 N.C. App. 150, 160 S.E.2d 501, 503 (1968); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435, 437 (1972); *and see State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 833 (1903) (disapproving instructions that an affirmative defense must be established by the "greater proof" or "stronger proof").

proof required to 'satisfy the jury' . . . cannot be defined by the court as being 'less than,' 'the same as,' or 'more than' the greater weight of the evidence or the preponderance of the evidence," STANSBURY, NORTH CAROLINA EVIDENCE § 214 (2d ed. 1963), because "the jury alone is the judge" of what satisfies it, *State v. Prince*, 223 N.C. 392, 265. E.2d 875, 876 (1943). Therefore, the " 'accepted formula *and the one that should be used if risk of error is to be avoided*, is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – but simply to the satisfaction of the jury." ' " *State v. Freeman, supra*, 170 S.E.2d at 464 (quoting STANSBURY, *op. cit. supra* (emphasis in opinion)).

The elements of which the jury must be thus "satisfied" are characteristically impressionistic. In assessing petitioner's claim of self-defense, for example, his trial jurors were called upon to decide whether, at the time of the incident with a man who had beaten him bloody that afternoon, petitioner had a "reasonable" apprehension of the necessity to kill in order to avoid suffering death or great bodily harm. *See State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750, 754 (1973); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 27 (1968); *State v. Johnson*, 270 N.C. 215, 154 S.E.2d 48, 52 (1967); *State v. Fowler*, 250 N.C. 595, 108 S.E.2d 892, 894 (1959); *State v. Bryant*, 213 N.C. 752, 197 S.E. 530, 533 (1938); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828 (1938). The application of this principle in the context of a case where the defendant seeks to prove that a prior fight with the decedent was

resumed just before the killing obviously presents peculiar difficulties. *See State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

> "[O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

State v. Marshall, 208 N.C. 127, 179 S.E. 427, 428 (1935).[123] *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249, 253 (1971); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 159 (1965). However, the defendant must not have been the "aggressor," *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973) – a notion apparently involving concepts of relative "fault"[124] – and he must have "used no more force

[123] The *Marshall* case is frequently cited as the leading modern exposition of the law of self-defense in North Carolina. A more recent summary is found in *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 600-601 (1973). *See also State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450-453 (1970); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 26-29 (1968); *State v. Goode*, 249 N.C. 632, 107 S.E.2d 70, 71-72 (1959); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 832-835 (1903).

[124] The North Carolina cases abound with statements that, in order to prevail on a claim of self-defense, a defendant must have been "without fault" in provoking the assault against which he defends. *See, e.g., State v. Watkins* 283 N.C. 504, 196 S.E.2d 750, 755 (1973); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 429-431 (1971); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Johnson*, 278 N.C. 252, 179 S.E.2d 429, 432 (1971); *State v. Davis*, 225 N.C. 117, 33 S.E.2d 623, 624

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than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm," *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971). The use of "excessive force" defeats a claim of self-defense;[125] but one who uses excessive force may nevertheless prevail upon the partial defense of *imperfect* self-defense, which reduces murder – even by an intentional killing – to manslaughter, *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221, 225 (1971);

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(1945); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828-830 (1938); *State v. Blevins*, 138 N.C. 668, 50 S.E. 763, 764 (1905). In *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916), the North Carolina Supreme Court refined the fault concept (" 'a perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his actions,' " 87 S.E. at 514) by recognizing degrees of fault: if a defendant begins an affray with the intention of inflicting great bodily harm, his right of self-defense is lost and the killing is murder; but if he begins or provokes the affray with some lesser assault or verbal abuse, his right of self-defense is rendered "imperfect," *ibid.*, and he is guilty of manslaughter. The *Crisp* principle, turning the right of self-defense upon moral blame-worthiness, has deep roots in North Carolina law. *See, e.g., State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888).

[125] *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973). *See also, e.g., State v. Benge*, 272 N.C. 251, 158 S.E.2d 70, 72 (1967); *State v. McDonald*, 249 N.C. [illegible], 106 S.E.2d 477, 478 (1959); *State v. Mosley*, 213 N.C. 304, 195 S.E. 820, 832 (1938); *State v. Terrell*, 212 N.C. 145, 193 S.E. 161, 164 (1937); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, 428 (1935); *State v. Glenn*, 198 N.C. 79, 150 S.E. 663, 664 (1929); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910).

State v. Wynn, 278 N.C. 513, 180 S.E. 2d 135, 139 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617, 619 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910). *See also State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, 363 (1971); *State v. Ramey*, 273 N.C. 325, 160 S.E.2d 56, 59 (1968). Moreover, one who kills under the impulse of an *unreasonable* fear of death or serious bodily harm may also claim imperfect self-defense, reducing murder to manslaughter. *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836-837 (1922);[126] *and see State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970).

Another partial defense that may result in a manslaughter verdict is provocation and passion. The North Carolina version of this doctrine is complex. Provocation alone (isolated from the passion that it may arouse) is held not to preclude malice but only to rebut the presumption of malice arising from an intentional killing with a deadly weapon. *State v.*

[126]In addition to the "excessive force" and "unreasonable fear" varieties of imperfect self-defense, North Carolina law recognizes other situations in which a killing may be nonmalicious, and hence merely manslaughter, because the defendant's use of deadly force was self-protective although not legally justifiable under the doctrines pertaining to self-defense. *See State v. Finch*, 177 N.C. 599, 99 S.E. 409, 414 (1919); *State v. Yarborough*, 8 N.C. 78, 85 (1820). One such situation is the permutation of the "aggressor" doctrine described in note 124 *supra*. Another is the situation in which the defendant fails to comply with the "safe-retreat" requirement for perfect self-defense. *See State v. Garland*, 138 N.C. 675, 50 S.E. 853, 854-855 (1905); *cf. State v. Johnson*, 23 N.C. 354, 364 (1840).

Johnson, 23 N.C. 354, 359 (1840). Passion aroused by provocation, on the other hand, is said to be legally exclusive of malice: "[i]n law they cannot co-exist." *Id.* at 362. The psychological explanation offered by the early cases is that passion renders an individual heedless of the dictate of reason not to kill. *See State v. Hill*, 20 N.C. 491, 496 (1839); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910). But even from the outset the doctrine has been seen as an "indulgence of the law," *State v. Hill, supra*, 20 N.C. at 496, "a condescension to the frailty of the human frame," *ibid.* "In mitigating the offence to manslaughter where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other." *State v. Jarrott*, 23 N.C. 76, 85 (1840). *See also State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916). As might be expected of a moralistic conception of this nature, its rules are fine-spun and casuistic. The North Carolina Supreme Court has declared that "'"passion" means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection' . . . . 'Passion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, "excitement" or "nervousness,"'" *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970). Passion must spring from provocation, *State v. Carter*, 76 N.C. 20, 22-23 (1877); "slight" provocation is insufficient, *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *see*

State v. Keaton, 206 N.C. 682, 175 S.E. 296, 298 (1934); the provoking conduct must in theory "amount to an actual or threatened assault," *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *see also State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832-833 (1938).[127] North Carolina appellate courts have managed to remain within these rules with only a little straining;[128] but trial courts and juries have ignored them entirely.[129] Passion is sometimes said to be synonymous with "heat of blood," *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); but then again it is said that " 'cool state of blood' does not mean the absence of passion and emotion . . . ." *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974). The sum of the doctrine is to make murder or

[127]The provoking conduct need not, however, amount to a felonious assault, *State v. Will*, 18 N.C. 121, 169 (1834), and it need not have threatened the defendant's life, *State v. Sizemore*, 52 N.C. 206, 209 (1859).

[128]*See, e.g., State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910) (unlawful arrest by the victim who "shoved" the defendant held adequate provocation); *State v. Briggs*, 20 N.C. App. 368, 201 S.E.2d 580 (1974) (victim's actions of breaking defendant's car window and inserting the upper part of his body into the car held adequate provocation).

[129]*See, e.g., State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969) (victim threatened defendant, ran away, returned with his hand in his pocket; defendant who shot victim convicted of manslaughter); *State v. Phillips*, 262 N.C. 723, 138 S.E.2d 626 (1964) (victim opened door of car containing defendant and woman friend; defendant who shot victim convicted of manslaughter).

manslaughter liability depend essentially upon the jury's empathy with the defendant on trial:

> "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

State v. Merrick, 171 N.C. 788, 88 S.E. 501, 503 (1916) (quoting *Maher v. People*, 10 Mich. 212, 220 (1862)).[130]

These several doctrines, of course, do not exhaust the non-capital options available to petitioner's jury. Jurors in his case or like cases, applying legal principles that leave the widest latitude for subjective judgment and the "natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion,"[131] might have returned verdicts ranging

[130]Provocation may also be held inadequate where the defendant's response is disproportionately severe. *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Curry*, 46 N.C. 280, 287 (1854). *Cf. State v. Gooch*, 94 N.C. 987, 1010 (1886).

[131]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46 (1974).

from second degree murder[132] to acquittal,[133] in order

[132]Alcohol was implicated in petitioner's case (A. 14-15, 28-29, 52, 54), as it is in so many homicide cases. *See* WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 165-166, 323 (1966). Its involvement required consideration by the jury on the question of the premeditation and deliberation requisite for a capital, first degree murder conviction.

> "... [W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. 'No inference of the absence of deliberation and premeditation arises from intoxication as a matter of law.' State v. Murphy, 157 N.C. 614, 619, 72 S.E. 1075, 1077. '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.'"

State v. Hamby, 275 N.C. 674, 174 S.E.2d 385, 387 (1970). *See also State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65, 69-70 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526, 532-533 (1970); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567-568 (1968); *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473, 474-475 (1965); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 321 (1942).

[133]Jury acquittals motivated solely to evade "mandatory" death sentences are an historical commonplace in the administration of "capital" justice. *See, e.g., State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra*; *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107, *supra*; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. Rev. 1009, 1102 n.18 (1953); Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 52 (1964); ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2-3 (Center for Studies in Criminal Justice, 1968); Smith, *Capital Punishment*, 59 ALBANY L.J. 232, 241 (1899); Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM. L. REV. 321 (1909).

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to avoid the death penalty. The inevitable propensity of

In *McGautha v. California*, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.* at 198, and the fact that "jurors on occasion took the law into their own hands in [murder] cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.* at 199. *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (concurring opinion of Justice Frankfurter); KALVEN & ZEISEL, THE AMERICAN JURY 306-312 (1966); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974). *Cf.* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT ¶¶ 27-29 (H.M.S.O. 1953) [Cmd. 8932]; 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 154-160 (1948). "[B]y far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence." BEDAU, THE DEATH PENALTY IN AMERICA 27 (rev. ed. 1967). This fact is cited by scholars as a reason for a particular jurisdiction's shift from a mandatory to a discretionary system of death sentencing or for a decline in a jurisdiction's conviction rate. *See, e.g., The Death Penalty in the United States*, 9 GREENBAG 129 (1897) (New York); McCafferty, *Major Trends in the Use of Capital Punishment*, 25 FED. PROB. (No. 3) 15 (1961) (District of Columbia); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 28-31 (1965) (New Jersey); Phelps, *Rhode Island's Threat Against Murder*, 18 J. CRIM. L. & CRIM. 552 (1928) (Rhode Island); Bennett, *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958), and

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any "mandatory" death-sentencing regime to produce this sort of selective evasion by juries is, of course, enhanced when the death penalty is made "mandatory" for a broad range of offenses including all first degree

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[footnote continued from preceding page]

Bennett *Delaware Abolishes Capital Punishment*, 49 J. CRIM. L., CRIM. & POL. SCI. 156 (1958) (Delaware).

Cf. Wicker, "Christmas on the New Death Row," N. Y. Times, Dec. 25, 1973, at 18, col. 1:

> "Raleigh, N.C. Dec. 24 ... In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; ... Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

murders, rapes, first degree burglaries and arsons.[134] It is encouraged, and all but explicitly condoned, by the North Carolina Supreme Court's ruling – which appears to have no other purpose or effect than to invite the exercise of jury discretion – that capital jurors may be informed of the consequences of their supposedly "mandatory" verdict and its alternatives. *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). There, the court held that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence ... sufficient compelling reason exists to justify [the trial judge's] ... informing the jury of the consequences of their possible verdicts." 204 S.E.2d at 828. The court additionally ruled that "[c]ounsel may, in his argument to the jury, in any

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[134]Indeed, there is evidence that North Carolina adopted a discretionary form of capital sentencing in order to avoid unwarranted acquittals for these crimes by juries who did not want to see sympathetic defendants executed. In 1949, the Special Commission for the Improvement of the Administration of Justice in North Carolina reported that:

> "[o]nly three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, though guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. [A discretionary death penalty] ... is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases."

15 POPULAR GOVERNMENT 13 (January, 1949). A discretionary capital sentencing procedure was adopted shortly thereafter. *See also State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. . . ." The defense attorney is not forbidden, "in his argument to the jury [to] . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." *Id.* at 829.

The manner in which juries function in capital cases – particularly when they are told explicitly what is at stake – has been judicially noticed by the Supreme Court of North Carolina[135] and cannot realistically be ignored by this Court.[136] We venture to say that not a year passes when the certiorari process does not present a multitude of cases, rationally undifferentiable from petitioner's, in which a jury has returned a verdict of second degree murder or less. An altercation in a bar – a separation and renewed meeting of the combatants – some alcohol – a gun: the ingredients are tragically common. They form the backdrop of innumerable killings, crimes whose gravity no one can doubt, but which differing juries have immemorially treated as manslaughter, second degree murder, or first degree murder upon grounds that can only be described as inscrutable. The law reports of North Carolina are full of such cases where the verdict was less than first degree.[137] Spectroscopic color-matching of particular

[135] *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107 *supra*; *State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra*; *State v. Brittain*, 89 N.C. 481, 501 (1883), quoted in text at p. 81, *supra*.

[136] *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion of Mr. Justice Frankfurter).

[137] We collect some of the cases in Appendix C, pp. 1c-4c *infra*.

cases with petitioner's undoubtedly discloses all of the more or less subtle differences of which the multifariousness of human existence is made. But it is impossible to read any number of these cases and deny the purely discretionary character of the jury judgments they reflect.

D. Executive Clemency

The North Carolina Constitution provides that:

> "[T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."

Article III, § 5(6). Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of 235 out of a total of 358 condemned prisoners were commuted.[138] The chief executive thus commuted 65.6% of North Carolina death sentences over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature only the right to prescribe the "manner of applying for pardons;" otherwise, the Governor may grant or deny clemency as he chooses, subject to "such conditions as he may think proper."

[138] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 192 (1964). *See* notes 146, 147 *infra*.

The North Carolina Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> "[i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable."

Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

This conception of executive clemency is, of course, widespread; but it may be noted that the authority of the Governor of North Carolina in its exercise is less encumbered than that of the governors of many States. Several of the States which retain the death penalty have chosen to place some or all of the authority to make the clemency decision in the hands of a pardon board or executive council,[139] while others require periodic reports to legislative bodies on the exercise of executive clemency,[140] open hearings,[141] preparation of reasoned decisions on each application,[142] or, in certain kinds of cases, the advice of judicial authorities.[143] The

[139]*See, e.g.*, Conn. Gen. Stat. Rev. § 18-24a (1970); Idaho Const. art. 4, § 7; Utah Code Ann. § 77-62-2 (1968); Neb Const. art. 4, § 13.

[140]*See, e.g.*, N. Y. Const. art. 4, § 4; Ark. Code Ann. § 41-4714 (1973 supp.).

[141]*See, e.g.*, Idaho Const. art. 4 § 7; Neb. Const. art. 4, § 13; Pa. Const. art. 4, § 9.

[142]*See, e.g.*, Del. Const. art. 7, § 1; Utah Const. art. 7, § 12.

[143]*See* California Const. art 5, § 8 (1974 West cum. supp.).

North Carolina procedure requires none of these things.[144]

Under laws providing for a "mandatory" death penalty, grants of clemency have been considerably more frequent than under procedures giving juries explicit discretion to sentence convicted capital defendants to life or death. A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations of death sentences after the 1941 and 1949 statutory amendments which enabled juries to impose sentences of either life imprisonment or death for the four crimes that had theretofore carried "mandatory" death penalties.[145] A 1973 report on the history of the death

[144]North Carolina has, however, adopted the practice of announcing reasons for the grant, but not for the denial, of executive clemency. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 158 (1964).

[145]Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166-167 (1957). A study of the history of the death penalty in New Jersey also found evidence that clemency is afforded more frequently under a "mandatory" system than under a discretionary system. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964). During the years when the death penalty was mandatory (1907-1915), there were 42 executions and 11 death sentences commuted, a ratio of 11/42 or 26.2%. *Id.* at 10. However, during the years 1916-1960, when a discretionary system of capital punishment was in effect, there were 115 executions and 22 commutations, for a ratio of 22/115 or 19.1%. *Ibid.*

penalty in the State found that while 64%[146] of condemned defendants escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38% for the 1949-1962 period, when a discretionary death penalty was in effect for all "capital" crimes.[147]

The apparent explanation for this phenomenon is that in a "mandatory" system, the clemency authority undertakes to compensate for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. Clemency serves "as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of [the] . . . judicial system."[148] One study has noted:

> "[i]n a jurisdiction which provides for the sentence of death unless the jury recommends mercy, the judge being bound by the jury's recommendation to impose a sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."[149]

If this observation is correct, the "mandatory" death penalty created by *State v. Waddell* is calculated to result in more frequent grants of executive clemency as the Governor effectively takes over where the jury leaves off. Not surprisingly, the clemency process will simply mirror the jury sentencing process condemned in *Furman*, with Governors granting or denying commutation according to standards that are unexplained, unreviewable, and changeable whenever different incumbents take office.[150]

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[146]BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3 (N.C. Dept. of Corrections 1973). This 64% figure is slightly different from the commutation rate cited in the *N.Y.U. Law Review* study, p. 95 *supra*, because the years surveyed (1903-1963 in the *N.Y.U. Review* study; 1910-1948 in the Behre study) were not identical. Another study of executive clemency in North Carolina reveals that of the 304 death sentences imposed between July 1, 1938, and December 31, 1953, 229 were commuted by the Governor, for a 77.1% clemency rate during this period. Johnson, *supra* note 145, at 166.

[147]BEHRE, *op. cit. supra* note 146, at Tables 2 and 3.

[148]Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 38 (1965).

[149]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

[150]*See* the studies cited in note 145 *supra*. A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary by definition. It can also be demonstrated that such a system is likely to be discriminatory in effect. A comparison of the executed and the commuted among condemned prisoners in Pennsylvania between 1914 and 1958 revealed that "less than 15 percent of the death-row offenders with court-appointed counsel received commutation of sentence compared to over 25 percent of those offenders with private counsel" (this differential was characterized as statistically significant for black, but not for white defendants) and that "there is reason to suspect – and statistically significant evidence

(continued)

"For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death – the final such choice in a long series."[151]

The various forms of arbitrary selectivity remaining in North Carolina's "mandatory" death penalty procedure thus insure that there will be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. We do not suggest by the foregoing analysis that the selective discretion present at any of the separate stages of the criminal process would be constitutionally

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(footnote continued from proceeding page)

to support the suspicion – that Negroes have not received equal consideration for commutation of the death penalty." Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301, 309, 311 (1962).

A study of executive clemency in Illinois concluded:

"[c]ertain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck! What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?"

Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 39 (1965).

[151]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 74 (1974).

objectionable in a non-capital case[152] or even that any one form of discretion would necessarily be enough to invalidate a death penalty under the Eighth Amendment. But the arbitrariness of the entire procedural system is cumulative; and the gauntlet which a capitally charged defendant must now run is fully as unpredictable – its results equally capricious – as under the pre-*Furman*, pre-*Waddell* system. At no point in the process is a visible and deliberative life-death choice required; yet the inevitable discretionary decisions can only be more freakish and wanton inasmuch as they are disguised and more diffused. This deadly lottery brings petitioner's death sentence to the heart of the historic concerns of the Eighth Amendment as recognized in *Furman*.

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[152]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (1974):

"[o]ur legal system is simply saturated, at all levels, with the ideas that requirements of fairness, certainty, and so on – all the things we mean when we say 'due process of law' – vary with the seriousness of the interest at stake, and that, as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society."

Cf. Bell v. Burson, 402 U.S. 535, 540 (1971); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972). *See also* pp. 115-117 *infra*.

III.

THE EXCESSIVE CRUELTY OF DEATH

There are additional reasons why the death penalty reinstated by *Waddell* violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing *Furman* opinions, and we treat them together here. Essentially, *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and occasional under North Carolina's post-*Furman*, purportedly "mandatory" system of capital sentencing because that system provides numerous mechanisms which express and implement the unwillingness of prosecutors, judges, juries and the Governor to accept a general, uniform and even-handed application of the penalty. These mechanisms and their use continue to be the means by which a punishment incapable of general

or substantial application is reserved for visitation on a mute and disfavored few. That sort of application of a penalty is one of the hallmarks of a cruel and unusual punishment in the Eighth Amendment sense. In this Part III, we examine the several relevant hallmarks and submit that they collectively condemn the penalty of death. Such an examination should, however, begin with consideration of the proper standards of judicial review of a penalty challenged under the Eighth Amendment.

A. The Standard of Judicial Review

We start with the "elementary" truth[153] that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles of decency.[154] If this were otherwise, the Eighth Amendment would be "little more than good advice" from the Founding Fathers to future legislators. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of

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[153] *Weems v. United States*, 217 U.S. 349, 379 (1910).

[154] *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion of Chief Justice Warren):

> "[w]e are oath-bound to defend the Constitution. This obligation requires that [legislative] ... enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren.)[155] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication: striking the balance between respect for the primary legislative power to define crimes and fix sanctions[156] and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's

[155]George Mason, who drafted the 1776 Virginia Declaration of Rights, *see* note 56 *supra*, which contained a prohibition of cruel and unusual punishments that was almost identical to that of Clause 10 of the English Bill of Rights of 1689 and to the Eighth Amendment, declared in the Virginia ratifying convention that it was necessary to limit the arbitrary punishing power of all branches of government. *See* pp. 38-39 *supra*. Patrick Henry strongly agreed that Congress should not be allowed to "define punishments without this control." 3 ELLIOT'S DEBATES 447 (2d ed. 1863). *See* note 55 *supra*.

[156]In this litigation we deal, of course, with a decision to maintain capital punishment that was made by a bare majority of the North Carolina Supreme Court through the application of state-law severability doctrines to a state statute. Nevertheless, that decision speaks with the voice of North Carolina for federal constitutional purposes. *See Winters v. New York*, 333 U.S. 507, 512-515 (1948); *Cohen v. California*, 403 U.S. 15, 23-24 n.5 (1971).

guarantees of individual rights against governmental – that is, necessarily, majoritarian – overreaching.[157] The inescapable tension and its resolution were described with as much precision as the subject permits in *Weems v. United States*, 217 U.S. 349, 378-379 (1910):

> "... prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, – that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by

[157]*Furman v. Georgia*, *supra*, 408 U.S. at 431 (dissenting opinion of Mr. Justice Powell) (citing *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion)):

> "[t]he review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that the Court is called on to perform.'"

presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to the autonomy of the States is always required, this Court bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.[158]

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). This is most frequently the case where statutes fall harshly only upon "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),

[158] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

"[i]n 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

See also United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3106 (1974).

and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," *id.* at 152 n.4. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles, supra*, 356 U.S., at 101.

First, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, that his " 'life ceases to be sacred when it is thought useful to kill him.' "[159] Such a judgment deliberately to extinguish human life[160] —

[159] Francart, quoted by Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 176 (Mod. Lib. 1963).

[160] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " *Furman v. Georgia, supra*, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan).

to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests – imperatively calls upon "the obligations [of] . . . the judiciary to judge the constitutionality of punishment" from an independent perspective. *Furman v. Georgia, supra,* 408 U.S. at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality[161] incomparable with other punishments.[162] This Court has said of sterilization that "[t]here is no redemption for the individual whom the law touches." *Skinner v. Oklahoma ex rel. Williamson, supra,* 316 U.S. at 541. That is *literally* true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility.[163] New

[161]"Capital punishment is an evil, unless justified [because] . . . it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life." Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 291 (1971).

[162]Thus, the declaration of Lafayette that infliction of the death penalty should be suspended "until . . . the infallibility of human judgment is demonstrated." Quoted in Pollak, *The Errors of Justice*, 284 ANNALS 115 (1952), and CLARK, CRIME IN AMERICA 334 (1970). The quotation has also been attributed to Jefferson. *See* BLOCK, AND MAY GOD HAVE MERCY . . . 1 (1962). *See also* Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQ. 121, 130-131 (1969).

[163]"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed perhaps after many years in prison by the discovery of the real criminal."

(continued)

knowledge, second thought, calmer passions, lessons of experience – every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.'"[164]

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which a civilized, Twentieth-Century society can accept.[165] We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, *cf. Robinson v. California,* 370 U.S. 660, 667 (1962) –

(footnote continued from preceding page)

SELLIN, THE DEATH PENALTY, 63 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959). *See also* Hogan, *Murder by Perjury*, 30 FORDHAM L. REV. 285 (1961); BORCHARD, CONVICTING THE INNOCENT 294-303, 309-316 (1932); Gardner, *Helping the Innocent*, 17 U.C.L.A. L. REV. 535 (1970).

[164]"[D]eath is different . . . it is irrevocable in quite a distinct sense from the general irrevocability of all happenings. If a mistake of any kind is discovered, it is too late. In every way and for every purpose, it is too late." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 32 (1974).

[165]The evolutionary character of Eighth Amendment standards no longer needs argument. The Clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). *See also Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas; *id.* at 264-269 (concurring opinion of Mr. Justice Brennan); *id.* at 325-328 (concurring opinion of Mr. Justice Marshall); *id.* at 383 (dissenting opinion of Chief Justice Burger); *id.* at 409 (dissenting opinion of Mr. Justice Blackmun); *id.* at 429 (dissenting opinion of Mr. Justice Powell.)

cruel in "consideration of the mischief and the remedy", *Weems v. United States, supra,* 217 U.S. at 373.[166]

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological

[166]Nevertheless, Camus' point deserves note:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 151-152 (Mod. Lib. 1963).

torture. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 894 (1972). With the commendable motive – and under the inescapable obligation – of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on Death Row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years.[167] "[C]ontemporary human knowledge"[168] of the nature of suffering and its effects upon the human mind teaches that over such extended periods the familiar manifestations of immediate terror cease as the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications without severe personality distortions such as the denial of reality.[169] The effects of these coping mechanisms observed in Death Row prisoners are acute;[170] the alternative is emotional

[167]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 42 (August, 1971).

[168]*Robinson v. California*, 370 U.S. 660, 666 (1972).

[169]*See*, Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 82 (1972).

[170]*See* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 39 (1962).

breakdown.[171]

The torture is perhaps more nearly comprehensible in the words of those who have suffered it:

> "My feeling toward being on death row is unlimited. I can go on and on telling you the different feelings I experience being on Death Row. But I'm going to make it brief, because I can take the 68,634,000 square miles of the Pacific Ocean and put it into ink, and take all the trees in America and put them into pencils and paper, and still, it won't be enough material to express my feeling towards being on death row. My feeling being on death row is like no tomorrow. When I go into deep meditation, I can see life and feel the freedom that the universe has to offer, but when I come out of it, it's like being in the middle of a nightmare. So you can see why my thoughts has no end.

[171]An evaluation of eight North Carolina death row inmates revealed that three, or thirty-five percent, had made "relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81, 82, 1972. One of these had developed a complex delusional system; another became increasingly self-destructive and a third was constantly under medication "with varying degrees of unsustained relief" and was once hospitalized for drug overdose. *Id.* at 82-83. *See also* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125, 127 (G.P.O. 1970); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion of Justice Frankfurter).

> I feel as tho the world is caving in on me."[172]

The physical and psychological pain of execution itself – whether life is destroyed by gas, by electrocution, or by other means – is, of course, unmeasurable.[173] It is

[172]Coley, *A Letter from Death Row*, 3 JURIS DOCTOR 19 (Dec. 1973). *Cf.* DOSTOEVSKY, THE IDIOT 20 (Mod. Lib 1935). *See generally* LEVINE (ed.), DEATH ROW–AN AFFIRMATION OF LIFE (1972); CHESSMAN, TRIAL BY ORDEAL 3 (1955):

> "I've witnessed the disintegration of the minds of the men around me. I've seen these men naked on the floor, rolling in their own excrement. I've listened as they smashed and shattered the sinks and toilets and fixtures in their cells. I've heard their prayers and their screams and their curses. I've observed their bodies being removed after they had destroyed themselves. I've read their pathetic pleas for mercy."

[173]All medical witnesses agree that it takes a few seconds for the condemned man to lose consciousness after inhaling lethal gas. *See* Hamer, *The Execution of Robert H. White by Hydrocyanic Acid Gas*, 95 J. AM. MED. ASSN. 661 (1930); Rosenbloom, *Report of a Case of Chronic Hydrocyanic Acid Poisoning*, 8 J. LAB. & CLIN. MED. 258 (1923); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 251-256 (H.M.S.O. 1953) [Cmd. 8932]. Other scientists assert that the condemned man is conscious for a longer time and dies by slow agonizing strangulation. KEVORKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 18-19 (1960). *See also* Schmitt & Schmitt, *The Nature of the Nerve Impulse: The Effect of Cyanides Upon Medullated Nerves* (Pt. 2), 97 AM. J. PHYSIOLOGY 302, 302-304 (1931). *Cf.* DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 102-103 (1962):

> "[t]he warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water

(continued)

one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra,* 408 U.S. at 287 (concurring opinion of Mr. Justice Brennan). Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply *cannot* know significant facts on which advised, dispassionate judgment ought to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap (*compare, e.g., McGinnis v. Royster,* 410 U.S. 263 (1973)), and all a legislature's "groping efforts" at experimenting with the penalty of death (*compare, e.g., Tigner v. Texas,* 310 U.S. 141, 148 (1940)) will not provide its members or mankind more information on the subject.

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and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way."

Evidence regarding the experience of electrocution is similarly inconclusive. A French scientist, Dr. L. G. V. Rota, has said "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be." Quoted in SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 219 (1950).

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations.[174] Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere,[175] and is now in virtual disuse throughout the world.[176] A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a Nation whose citizens would be widely appalled to believe it laggard in the enlightened administration of justice.[177]

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close

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[174]Despite a wave of terrorist bombings in 1974, the British House of Commons decisively rejected a measure to reinstitute the death penalty in Great Britian for terrorist murders. N.Y. Times, Dec. 12, 1974, at 7, col. 1.

[175]An analysis of world-wide trends in the authorization and use of the penalty of death is contained in Appendix D pp. 1d - 6d *infra.*

[176]"Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) 3 (February 23, 1971).

[177]In declaring denationalization a cruel and unusual punishment, the Court relied in part upon the fact that "[t]he civilized nations of the world [were] . . . in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop. v. Dulles, supra,* 356 U.S. at 102.

scrutiny of the punishment of death. The principle of strict construction *in favorem vitae* runs deep in Anglo-American history,[178] and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake:

> "[a]ll the state legal systems in one way or another – by requiring jury unanimity, by forbidding pleas of guilty to a capital offense, by providing for automatic appeals, and so on – have recognized this distinction, quite without compulsion from the national Supreme Court. But when such compulsion was needed it has been forthcoming. For many years our federal Supreme Court required of the states that they invariably assign counsel in capital cases, while leaving the question of counsel in noncapital cases open to variation based on special circumstances; the fact that at last the Court decided counsel should be required in all serious criminal cases does not impair the force of the earlier cases as establishing national recognition of the immense difference between imprisonment and death. On the other side of the coin, the Supreme Court has several times upheld, as not violating any federal guarantee, state laws imposing more stringent requirements for trial in capital cases than in other cases."[179]

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[178] *See* 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-105 (1948).

[179] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 34 (1974). Professor Black refers, of course, to the evolution from *Powell v. Alabama*, 278 U.S. 45 (1932), through *Betts v. Brady*, 316 U.S. 455 (1942), to *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to such cases as *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts . . . in favor of the accused,"[180] and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error.[181] At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question.

Finally, in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands. Other punishments – even punishments of extreme severity – are and have long been accepted without the extraordinary controversy, the collective soul-searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of capital punishment. Despite the relatively minuscule number of its victims[182] the justifiability of the death penalty has been the subject of continuing and heated

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[180] *Andres v. United States*, 333 U.S. 740, 752 (1948). *See also, e.g., Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id.* at 77 (concurring opinion of Justice Harlan).

[181] Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 659 (1974), and authorities cited.

[182] In 1970 nearly 80,000 persons were admitted to state and federal adult correctional facilities, only 127 of whom were under sentence of death. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 358, 465 (August 1973).

debate[183] in religious, academic, legislative and law enforcement circles and among the general public. It is surely the case that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." *Furman v. Georgia, supra,* 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment – frequently voiced by religious denominations,[184] among others – has been vigorously asserted on the basis of "fundamental moral and societal values in our civilization and in our society."[185] Proponents of the death penalty have responded with equal moral fervor.[186] Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument.

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[183]The arguments for and against capital punishment have been frequently catalogued. *See, e.g.,* Vialet, *Capital Punishment: Pro and Con Arguments* (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted *in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 172-200 (G.P.O. 1970); BEDAU, THE DEATH PENALTY IN AMERICA 120-123 (rev. ed. 1967); 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1363 (G.P.O. 1970). *See* notes 184-186 *infra.*

[184]For a description of the positions taken by various religious groups in opposition to capital punishment, see Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY No. 312 82, 84-85 August 1967).

[185]Canadian Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II) 4370 (Nov. 16, 1967). For similar expressions, *see, e.g.,* Kazis, *Jewish Tradition and Capital Punishment*, 6 TRENDS 6 (Nov.-Dec. 1973); Editorial, *Genesis and Capital Punishment*, 66 CHRISTIAN CENTURY 355 (March 28, 1973); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 10, 12, 16, 20, 26 (1974); National Council on Crime and Delinquency *Policy Statement on Capital Punishment*, 10 CRIME & DELINQ. 105 (1964); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. No. 2 11 (1964); Milligan, *A Protestant's View of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 175 (rev. ed. 1967); Ehrmann, *For Whom the Chair Waits*, 26 FED. PROB. No. 1 14 (1962); BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957)

[186]*See, e.g.,* Vellenga, *Christianity and the Death Penalty*, 6 CHRISTIANITY TODAY 7 (Oct. 12, 1959); Hon. Samuel Leibowitz, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 289-296 (1961); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 11, 13, 15, 21, 25 (1974); Kinney, *In Defense of Capital Punishment*, 54 KY. L. J. 742 (1966); McDermott, *Some Crimes Demand the Death Penalty*, 11 POLICE 4 (Mar.-April, 1967); Caldwell, *Why Is the Death Penalty Retained?* 284 ANNALS 45 (1952); Coakley, *Capital Punishment*, 1 AM. CRIM. L. Q. 27 (1963); Cohen, *The Need for Capital Punishment*, 20 CHITTY'S L.J. 86 (1972); Hook, *The Death Sentence*, in BEDAU, THE DEATH PENALTY IN AMERICA 146 (rev. ed. 1967); Barzun, *In Favor of Capital Punishment*, 31 AM. SCHOLAR 181 (1962).

Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return – reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it[187] – the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this Court at a moment when the Nation, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink.

Such an examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is] . . . deemed to serve."[188] Because of the unique character of the death penalty,[189] those justifications must be real and substantial;[190] and they must conform

[187] *See* pp. 134 - 139, *infra*.

[188] *Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[189] *See* pp. 107 - 120 *supra*.

[190] *Cf. N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964) (involving the right of association). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to the fashion in which the penalty is applied in fact.[191] If "less drastic means for achieving the same basic purpose"[192] are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[193] This much is implied in "the duty of [the] . . . Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification,"[194] or whether, conversely, the punishment of death is excessive[195] and therefore unconstitutional.

B. THE JUSTIFIABILITY OF THE PENALTY OF DEATH

Criminal punishments are traditionally justified by five related but separable objectives: reformation and

[191] *Cf. Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963) (involving the right of free speech); *See also e.g., Shapiro v. Thompson*, 394 U.S. 618, 631 (1969), *Carrington v. Rash*, 380 U.S. 89, 94-96 (1965).

[192] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (involving the right of association).

[193] *Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[194] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (involving the right of association).

[195] *Furman v. Georgia*, *supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall).

rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties.

Of the first two of these objectives, little need be said. Clearly "reformation . . . can have no application where the death penalty is exacted."[196] The imposition and execution of a death sentence are not designed to serve as instruments for the redemption of criminal offenders: to the contrary, they represent a determination that the offender is unredeemable.[197] Similarly, the moral reinforcement or reprobation function provides no substantial justification for the unique harshness of the death penalty.[198] While this

[196]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 18 (H.M.S.O. 1953) [Cmd. 8932]. *See also* SELLIN, THE DEATH PENALTY 69-79 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959); KOESTLER, REFLECTIONS ON HANGING 144-152 (Amer. ed. 1957); BEDAU, THE DEATH PENALTY IN AMERICA 395-405 (rev. ed. 1967); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

[197]*Cf.* Stephen, *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864): "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.'"

[198]*See* Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3, 16-17, 19 (1967).

objective doubtless requires that the most serious crimes be punished most seriously, "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty."[199] This objective contains no commensurability standard whereby the relative efficacy of the death penalty and life imprisonment can be judged. A severe punishment of any kind enforces equally the restraints of the criminal law.

While the death penalty may have once been necessary to control dangerous criminals, the development of a penitentiary system in the Nineteenth Century has provided an alternative means of containing such persons.[200] Moreover, there is evidence that

[199]BEDAU, THE DEATH PENALTY IN AMERICA 268 (rev. ed. 1967).

[200]*See* Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232:

> "[i]n 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them – in short, none of the attitudes, facilities and

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convicted murderers are less likely to engage in future criminal behavior than are other classes of offenders.[201] The execution of criminal defendants to insure their

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personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

There are now in this country, 4,401 state, federal and local correctional facilities employing more than 70,000 people. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 108-109 (August 1973).

[201] A study of parole violation found that "[t]he percentage of Willful Homicide violators returned to prison on new commitments . . . [was], with one exception (Alcohol Laws Violations), the lowest in any offender group." Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH CRIME & DELINQ. 87, 90 (1972). The murderer has also been found to have "a lower 'criminality level' than the non-murderer [while] in the prison population." Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers* 60 J. CRIM L., CRIM. & POL. SCI. 60, 70 (1970). Of twenty-six homicides committed in American prisons in 1964, only two were committed by inmates serving sentences for capital murder. Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

effective isolation from society is an excessive punishment since less drastic means now exist to protect society (and are customarily used, for example, to constrain homicide defendants whose mental condition renders them incompetent to stand trial). Although the death penalty effectuates the goal of isolation of offenders, it is an unnecessarily harsh mechanism for obtaining this result.

The fourth traditional goal of criminal punishments is retribution, the achievement of the ancient *talionis* principle.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law."

Furman v. Georgia, *supra*, 408 U.S. at 308 (concurring opinion of Mr. Justice Stewart). The question of how far retribution, standing alone, is a legitimate goal of the criminal law in the mid-1970's is a complex one; but this case does not present that question for decision, since the death penalty as it is administered under the *Waddell* decree is not retributive in any meaningful way:

> "the issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small

and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[202]

The concept of retribution requires both a factual equivalency and a procedural regularity in the imposition of punishment[203] which are simply not present in the administration of the death penalty for first degree murder, as we have demonstrated in Part II *supra*. While the *Waddell* death penalty might be sought to be justified indirectly in light of a retributive goal as a device to forestall private acts of vengeance, there is no empirical evidence that lynch law increases as executions decline. In fact, the relation between the lynching rate and the execution rate appears to be more one of direct than inverse proportionality, as the following statistics demonstrate:

	Known Executions[204]	
Decade	Legal	Illegal
1890's	1,214	1,540
1900's	1,176	885
1910's	1,031	621
1920's	1,162	315
1930's	1,667	130
1940's	1,284	5
1950's	717	2[205]

[202]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961).

[203]*See also* Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT 239, 243 (1967):

"if we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[204]BOWERS, EXECUTIONS IN AMERICA 40 (1974).

[205]Available data on illegal executions ended in 1956 *Ibid.*

There is yet another sense in which the death penalty can be said to bear no meaningful relation to the goal of retribution, for the *lex talionis* affords no commensurability standard. The attempts of various post-*Furman* statutes to authorize the death penalty for "outrageously or wantonly vile, horrible or inhuman" killings[206] attest to this difficulty. For surely there is no retributive logic to justify the simple asphyxiation or electrocution of a defendant who has committed an atrocious crime: such a crime demands a far harsher punishment (under this logic) than the "mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890) But such punishments are clearly forbidden by the Eighth Amendment. With these constitutional limitations, it cannot be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty.

The most frequently voiced justification for the death penalty is the deterrence of capital crimes. However, as the empirical findings collected in Appendix E to this brief, pp. 1e-10e *infra*, conclusively demonstrate, there is no credible evidence – despite the most exhaustive inquiry into the subject – that the death

[206]Ga. Code § 27-2534.1 (1) (7) (1973). *See* Appendix A, p. 22a *infra*.

penalty is a deterrent superior to lesser punishments.[207] The conclusions set forth in Appendix E may be briefly summarized. Official and scholarly inquiries have concluded overwhelmingly that use or disuse of the death penalty has no effect upon the frequency of criminal homicide. This conclusion is based on the following statistical evidence.

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.
>
> In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.
>
> Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.
>
> Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.

The same conclusion has been reached with regard to the "mandatory" death penalty; "no indication" has been found "that the mandatory death penalty [is] . . . a more effective deterrent of homicide than discretionary capital punishment."[208]

These findings are not surprising. For, in the first place, "crimes are committed for reasons other than a rational weighing of consequences."[209] And, in the second place, the very aberrational, violent behavior to which the death penalty is now exclusively applied is less deterrable than any other human behavior, whether the sanction is death or imprisonment:

> "[t]he deterrence argument requires that man be an essentially rational being, weighing all the possible consequences of his acts and rating the desirability of each possible consequence. Whether or not this view of man is generally true is

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[207]The few published claims of deterrent efficacy are based upon impressionistic accounts of law enforcement officers and do not explain the failure of the death penalty to affect crime rates. *See, e.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 130 (rev. ed. 1967); Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU, THE DEATH PENALTY IN AMERICA 135 (rev. ed. 1967). We know of only one research-based claim of the deterrent efficacy of the death penalty. It is based upon unpublished findings but has been alluded to in a recent article as "indicat[ing] that each execution prevents between 8 and 20 murders." Tullock, *Does Punishment Deter Crime?*, THE PUBLIC INTEREST No. 36 103, 108 (1974), referring to Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, "to be published" in THE AMERICAN ECONOMIC REVIEW, *id.*, at 111. Tullock goes on to say that: ". . . unfortunately, the data available for this study were not what one would hope for, so not as much reliance can be put upon [the] . . . results as one normally would give to work by such a sophisticated econometrician." *Id.* at 108.

[208]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

[209]Brief *Amicus Curiae* of the Committee of Psychiatrists for Evaluation of the Death Penalty, in *Aikens v. California*, 406 U.S. 813 [No. 68-5027] pp. 6-7.

debatable, but in the instance of murderers it is most certainly untrue."[210]

C. Public Acceptance of the Penalty of Death

Against the background of this evidence that the death penalty is excessive and unserviceable in terms of

[210]KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT 2 (*CENTER FOR RESPONSIBLE PSYCHOLOGY, BROOKLYN COLLEGE*, C.U.N.Y., Report No. 13, 1974). *See also* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703; FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION 31-38 (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972). Indeed, there is strong evidence that the death penalty may service to *incite* murder. It has been reported that in the seventeenth and eighteenth centuries there was an "epidemic of indirect suicides [in Norway and Denmark] . . . when depressed people committed murder in order to be put to death . . . ." *Id.* at 39. In both countries laws were passed specifically exempting such people from the death penalty. "The law passed in Denmark in 1767 abandoned the death penalty in cases where melancholy and other dimal persons (committed murder) for the exclusive purpose of losing their lives." *Ibid.* Moreover, there is evidence that even the limited publicity surrounding an execution "has a 'brutalizing' effect on the population that more than offset[s] any deterrent effects" by causing an increase in the incidence of homicide in the periods immediately surrounding executions. BOWERS, EXECUTIONS IN AMERICA 20 (1974). *See also* Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME & DELINQ. 333 (1974).

the legitimate goals of the criminal justice system, we ask the Court to look again at the use society has made of it. For although the facts warrant a judicial judgment of excessiveness, the Court need not rely solely on its own appraisal of them. Society itself has pronounced a judgment, by its actions if not by its words. That judgment is that the penalty of death is both excessive and unacceptable.

To be sure, thirty jurisdictions have enacted death-penalty legislation since *Furman* (narrower, in all but two cases, than their pre-*Furman* authorizations of capital punishment).[211] But, in every case, the legislature has preserved or created a wide range of selective mechanisms by which the death penalty can be avoided in most cases. Some States have expressly conferred life-or-death sentencing discretion upon capital juries, to be exercised pursuant to standards that purport to confine such discretion but do not do so in fact.[212] Other States allow escape from "mandatory" death penalties through a variety of preconviction and postconviction outlets like those of North Carolina which we have described in Part II at pp. 45-100 *supra*. In this setting at least, the number of legislative authorizations is not – as *Furman* properly held – an appropriate test of acceptability of a harsh punishment. For acceptability is measured by what an enlightened public conscience will allow the law actually to do, not what it will permit a statute to threaten vaguely.[213] And

[211]See note 15, *supra*; Appendix A, pp. 42a-43a, 55a *infra*.

[212]*See* Petition for Writ of Certiorari, *Eberheart v. Georgia*, No. 74-5174 (filed August 19, 1974) pp. 32-36.

[213]"The objective indicator of society's view of an unusually severe punishment is what society does with it . . . ." *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

the authors of even purportedly "mandatory" legislation – legislation written to be administered through discretionary judgments of prosecutors, judges, juries, and the Governor – can hardly be unaware that they are not in fact ordaining death except in a fraction of the cases covered by the statute.[214] Prosecutors may be relied upon to "avoid the unacceptably rigorous application of the letter of the law"[215] by filing and accepting pleas to non-capital charges[216] with the

[214] *Cf.* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974):

> "[a]s reported previously, a substantial 59 percent of the public now favors capital punishment in principle. No more than 39 percent of the same persons, however, could say, 'If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty.' Another 16 percent agreed with the statement 'I could never vote guilty, even if guilt were proven, knowing that the defendant would automatically receive the death penalty.' And a larger percent agreed that, 'I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty.'
>
> Thus, by 49-39 percent, the American people indicate that in actual practice they would individually oppose the automatic imposition of the death penalty if a person were proven guilty of a crime such as murder.
>
> The clear implication of these results is that while people feel that capital punishment is the most effective deterrent to crimes that take the life of other persons, there should be much latitude in the way the death sentence is handed out. The public wants to have the death penalty on the books, but would use it sparingly and by no means as an automatic punishment for a capital crime."

[215] *See* text at note 91 *supra*.

[216] *See* pp. 45-61 *supra*.

acquiescence (where required) of trial judges.[217] Juries can be counted on to make sentencing decisions "under the guise of resolving issues of evidential doubt."[218] At the end of the judicial process, the Governor may be expected to provide "an outlet from the rigorous inflexibility"[219] of "mandatory" capital punishment.

We are left, then, with the history of the past as prelude to the future. What that history shows is a rejection of the death penalty that "could hardly be more complete without becoming absolute."[220] Given a choice of punishing "capital" offenders by death or something less, American systems of criminal justice have chosen against death for all but a scant handful of offenders.

> "Although the number cannot be determined with precision, no one can doubt that in each of the

[217] *See* pp. 57,61 *supra*.

[218] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966). We have seen, indeed, that jury acquittals motivated by a desire to avoid capital punishment under "mandatory" sentencing schemes provided a major impetus for the replacement of those schemes with overtly "discretionary" ones during the late Nineteenth and early Twentieth Centuries. *See* note 133 *supra*. *Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV 32, 35 (1974):

> "[a]ntebellum Americans ... whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."

[219] *See* text at note 148 *supra*.

[220] *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

years involved [1930-1959], with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in a capital judgment.

. . . . . .

The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition . . . .

[T]his experience reveals a deep reluctance in our culture to employ the final sanction. . . ."[221]

This reluctance "to impose or authorize the carrying out of a death sentence"[222] is the more eloquent because of the context in which it has occurred. For it is fair to say that the conditions of administration of capital punishment during the past several decades have been such as to promote its public acceptability to the fullest extent consistent with its nature and the tenor of the public conscience. In the first place, every American execution since 1936 has taken place in secret, isolated by law from the public eye and

[221]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. F. 249, 252-253 (1961).

[222]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

conscience.[223] Indeed, there are but a handful of people in this Nation who have witnessed an execution and can speak with authority to the proposition that:

". . . if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency."[224]

The rarity and secrecy of executions account for the fact that, although it is everywhere agreed that the cruelty of a death sentence is such that its imposition requires extraordinary justification, the wealth of research and theoretical debate on the subject of capital punishment is largely ignored. The often noted fact that ". . . American citizens know almost nothing about capital punishment"[225] reflects two circumstances: we

[223]The first American State to abolish public executions was Pennsylvania, in 1834. *See* Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952). Public execution terminated in England in 1868, *see* TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 20 (1961), and such executions were progressively outlawed in the United States throughout the Nineteenth Century, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 6 (1919). The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 307 (3rd ed. 1959).

[224]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQ. 1, 6 (1969). *See* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[225]*Furman v. Georgia*, *supra*, 408 U.S. at 362 (concurring opinion of Mr. Justice Marshall) (citing Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465, 466 (1961), KOESTLER, REFLECTIONS ON HANGING 164 (Amer. ed. 1957); and DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257-258 (1962)).

are protected by distance and by official secrecy from its reality; and, as a consequence, there is no incentive to examine rigorously its justifiability.

But the death penalty also knows a different and less innocent kind of isolation from public consciousness and conscience. It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify – those most like ourselves in appearance, background and mores. Conversely, wrongs we would not tolerate when done to our own kin or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities[226]

[226] Racial discrimination in the imposition of capital punishment has been borne out in a number of discrete and limited but careful studies. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Committed Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). Moreover, it has seemed apparent to responsible commentators and individuals studying the administration of the death penalty in this country. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967); PENNSYLVANIA JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT 14-15 (1961); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 32, 88 (1968); BEDAU, THE DEATH PENALTY IN AMERICA 411-413 (rev. ed. 1967); CLARK, CRIME IN AMERICA 335 (1970); MATTICK, THE UNEXAMINED DEATH S. 17 (1966); WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS 77, 80-81 (1970); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death*

and to the poor[227] therefore cannot be ignored in

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Penalty, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); *and see* Rubin, *Disparity and Equality of Sentences – A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967); BOWERS, EXECUTIONS IN AMERICA 71-120 (1974); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GEORGIA J. CORRECTIONS 41 (1974). Evidence of discrimination has been equally strong when the sentencing systems under study were ostensibly mandatory:

> "... although we have no empirical evidence that the mandatory death penalty is superior to discretionary sentencing as a deterrent to murder, we have seen that it has been associated with higher levels of execution, with comparable levels of racial discrimination, and, very likely, with reduced levels of capital convictions. In view of this evidence, it would appear that the adoption of the mandatory death penalty would mean a greater sacrifice of human life, continued discrimination against blacks, and the inability to convict some guilty offenders, without any deterrent benefit."

BOWERS, *op. cit. supra*, at 162; *see also* Garfinkel, *supra*.

The following are the total numbers of persons executed between 1930 and 1970, broken down by offense and race, as they appear in UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, *Capital Punishment 1930-1970* 12 (August, 1971):

	Murder	Rape	Other	Total
White	1664(49.9%)	48(10.5%)	39(55.7%)	1751(45.4%)
Negro	1630(48.9%)	405(89.1%)	31(44.3%)	2066(53.5%)
Other	40(1.2%)	2(0.4%)	0(0.0%)	42(1.1%)
	3334(100%)	455(100%)	70(100%)	3859(100%)

[227] "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA 335 (1970). See DUFFY & HIRSHBERG, 88 MEN AND 2

(continued)

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assessing the quality of such acceptance as the penalty has had. For present purposes, it matters little whether these disproportions are the result of discrimination, passive lack of empathy, inadequacy of defense resources 228, or some more benign explanations. The very fact of the disproportion means that public response

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WOMEN 256-257 (1962); LAWES, TWENTY THOUSAND YEARS IN SING SING 302 (1932); LAWES, LIFE AND DEATH IN SING SING 155 (1928); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. (No. 2) 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait*, 15 CRIME & DELINQ. 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132 (1969). *And see* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n.8.

[228]For a review of the disadvantages under which defense of an indigent, low or moderate income person must be conducted, *see* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218-224 (1964).

to the enormity of the decision to kill a fellow human being is blunted. To the average citizen and the citizen of influence, death remains a penalty for *them*, not for *us*.

At this point, description of the acceptance of capital punishment by contemporary society becomes appropriately cyclical. For infrequent, racially and socially disproportionate application of the death penalty is maintained by the very attitudes it has helped to create. A harsh penalty, unacceptable in general application, is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared. Thus applied, the residue of the penalty is acceptable to the public, which feels no pressure to restrict its broad availability on the statute books. The broad availability of the penalty in turn creates consistent pressure upon prosecutors, jurors, judges, and Governors, to take advantage of a variety of selective mechanisms to avert the punishment from all but an impotent and anonymous few.

This pattern of use, in turn, makes the justifications of capital punishment even more hollow. Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to serve its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is unnecessary; as an instrument of retribution, it is inadequate, haphazard, and unjust. The few men whom it kills die for no reason; they are executed "in the name of a theory in which the executioners do not believe."[229] Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."[230]

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[229]Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 141 (Mod. Lib. 1963).

[230]Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3 (1967).